OAH 80-9008-35532
Revisor R-04157

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing the Environmental Review Program, Minnesota Rules, Chapter 4410

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2018) and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** with all disapprovals contained in the Report of the Administrative Law Judge dated August 22, 2019.

The Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

(1) Minn. R. 4410.4300, subp. 5, Item B;

(2) Minn. R. 4410.4300, subp. 6; and

(3) Minn. R. 4410.4300, subp. 27.

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report.

If the Department elects not to correct the defects associated with the proposed rules, the Department must submit the proposed rules to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2018).

Dated: August 27, 2019

WILLIAM MARSHALL
Chief Administrative Law Judge

[134005/01]

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In the Matter of the Proposed Amendments to Rules Governing the Environmental Review Program, Minnesota Rules, Chapter 4410

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge LauraSue Schlatter for rulemaking hearings on May 31, 2019, and June 26, 2019. The first hearing was held at the Minnesota Pollution Control Agency (MPCA), 520 Lafayette Road North, St. Paul, Minnesota, along with two-way video conference connection with MPCA offices in Brainerd, Detroit Lakes, Duluth, Marshall, and Rochester. The second hearing was held at the St. Cloud Great River Regional Library, 1300 W. St. Germain St., St. Cloud, Minnesota. The Environmental Quality Board (EQB or Board) proposes to amend Minn. R. 4410.0200, .0500, .4300, .4400, .4600, .5200, .7904, .7906, and .7926, all relating to the governing of environmental review, including silica sand project thresholds and establishment of thresholds for recreational trails.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).[1] The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permitted Board representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and any changes that might be appropriate. Further, the hearing process provided the general public an opportunity to review, discuss, and critique the proposed rules.

The Board's panel at the public hearing included: Nur Ibrahim, Assistant Attorney General on behalf of EQB; Denise Wilson, EQB Director of the Environmental Review Program; and Erik Cedarleaf Dahl, Director of Rulemaking for EQB.

One hundred eighty-eight people submitted written comments and more than 25 people submitted requests for a hearing between November 13, 2018, and February 4, 2019 (Dual-Notice Comment Period).[2] An additional public notice comment period occurred between February 25, 2019, and June 21, 2019, because the EQB rescheduled the public hearing dates.[3] Eight people submitted written comments during this period.[4]

[1] *See* Minn. Stat. §§ 14.001-.69 (2018).
[2] Exhibit (Ex.) I. Exs. I.99a-dd were submitted as eComments.
[3] Ex. Q.1.
[4] *Id.*

Approximately 47 people attended the public hearing held on May 31, 2019, and signed the hearing register.[5] The hearing continued until all interested persons had an opportunity to be heard concerning the proposed rules. Twenty-one members of the public provided oral comments regarding the proposed rules during the May 31, 2019, hearing and five public exhibits (P.1 through P.5) were received during that hearing.[6]

Approximately eight people attended the June 26, 2019, hearing in St. Cloud, Minnesota and signed the hearing register.[7] Five members of the public provided oral comments regarding the proposed rules during the June 26, 2019, hearing and no public exhibits were offered during that hearing.[8]

In total, 16 exhibits were received during the public hearings.[9]

The EQB offered the following Exhibits, which the Administrative Law Judge received into the record at the May 31, 2019, hearing:

A. Request for Comments published in the State Register.

A.1. Request for Comments dated July 22, 2013.

A.2. Request for Comments dated November 9, 2015.

A.3. Request for Comments dated October 24, 2016.

B. Not Applicable.

C. Proposed Permanent Rules Relating to Environmental Review: Mandatory Categories, including the Revisor's approval.

D. Statement of Need and Reasonableness (SONAR), as published with the State Register on November 13, 2018.

E. Transmittal letter showing the Board sent a copy of the SONAR to the Legislative Reference Library in electronic form.

F. Dual Notice.

F.1. Dual Notice as signed by the Chair of the EQB on November 5, 2018, and as mailed and posted to the EQB Webpage.

F.2. Dual Notice as published in the State Register on November 13, 2018.

[5] Rule Hearing Register (May 31, 2019).
[6] Rule Hearing Transcript Volume (Tr. Vol.) 1 (May 31, 2019).
[7] Rule Hearing Register (June 26, 2019).
[8] Rule Hearing Tr. Vol. 2 (June 26, 2019).
[9] The EQB submitted exhibits M-O as placeholders with no documentation in them. These exhibit markers were not used for any filed exhibits.

F.3. Amended Dual Notice as signed by the Chair of the EQB on December 20, 2018, and as mailed and posted to the EQB Webpage.

F.4. Amended Dual Notice as published in the State Register on December 31, 2018.

F.5. Notice of Hearing as mailed and posted on the EQB Webpage on February 25, 2019.

F.6. Notice of Hearing as published in the State Register on February 25, 2019.

F.7. Notice of Hearing as mailed and posted on the EQB Webpage on May 17, 2019.

F.8. Notice of Hearing as published in the State Register on May 20, 2019.

G. Certifications.

G.1. Certificate of Mailing Dual Notice #1 dated November 20, 2018.

G.2. Certificate of Mailing Dual Notice #2 dated December 31, 2018.

G.3. Certificate of Mailing Notice of Hearing dated March 6, 2019.

G.4. Certificate of Mailing Notice of Hearing and Additional Comment Period dated May 20, 2019.

G.5. Mailing lists, emails, webpages, and supporting documentation.

G.6. EQB Webpage update as of May 20, 2019.

H. Certificate of Giving Additional Notice pursuant to the Additional Notice Plan.

H.1. Certificate of Mailing Dual Notice #1 dated November 20, 2018.

H.2. Certificate of Mailing Dual Notice #2 dated December 31, 2018.

H.3. Certificate of Mailing Notice of Hearing dated March 6, 2018.

H.4. Certificate of Mailing Notice of Hearing and Additional Comment Period dated May 20, 2019.

H.5. Mailing lists, emails, webpages, and supporting documentation.

I. Written comments on the proposed rules received by the Board during the public notice comment period (November 13, 2018 – February 4, 2018).

J. Authorization from the Office of Administrative Hearings to omit from the Amended Dual Notice and the Notice of Hearing published in the State Register the text of the proposed rule.

J.1. Amended Dual Notice December 20, 2019, email from Office of Administrative Hearings.

J.2. Notice of Hearing February 19, 2019, email from Office of Administrative Hearings.

K. Any other document or evidence to show compliance with any other law or rule which the agency is required to follow in adopting these rules.

K.1. Certificate of Compliance with Minn. Stat. § 14.111 regarding farming operations dated September 28, 2018.

K.1.a. Email to send Letter to Commissioner of Agriculture.

K.1.b. Letter to Commissioner of Agriculture dated September 27, 2018.

K.2. Certificate of Sending Notice and SONAR to Legislators and Legislative Coordinating Commission as required by Minn. Stat. § 14.116.

K.2.a Certificate of Compliance date November 20, 2018.

K.2.b. Letter to Legislators dated November 20, 2018.

K.2.c. Certificate of Compliance –Amended Notice-- December 28, 2018.

K.2.d. Letter to Legislators dated December 28, 2018.

K.3. Certificate of Compliance with Minn. Stat. § 14.131, Regarding Consultation with Minnesota Management and Budget (MMB).

K.3.a. Certificate of Compliance dated September 5, 2018.

K.3.b. Email to MMB dated August 20, 2018.

K.3.c. Letter to MMB dated August 20, 2018.

K.3.d. Letter response from MMB dated September 4, 2018.

K.4. Certificate of Mailing a Notice of Hearing to those who requested a Hearing.

K.4.a. Certificate of Hearing Notice dated March 6, 2019.

K.4.b. Notice of Hearing – text as mailed/emailed dated March 6, 2019.

K.4.c. Notice of Hearing as published in the State Register on February 25, 2019.

K.4.d. Notice of Hearing as published in the EQB Monitor on February 25, 2019, and May 20, 2019.

K.4.e. Notice of Hearing emails to commenters dated February 22, 2019, and May 20, 2019.

K.4.f. Notice of Hearing emails to Additional Notice list dated February 20, 2019, and May 20, 2019.

K.4.g. Notice of Hearing emails to Additional Notice list 2 dated February 20, 2019, and May 20, 2019.

K.4.h. Plain Language Hearing Notice to all Hearing Requesters dated March 6, 2019.

K.4.i. Additional list for Notice of Hearing USPS.

K.5 Certificate of Mailing a Notice of Hearing to those who requested a Hearing.

K.6. Request for Comments. Certificate of Mailing the Request for Comments in Compliance with Minn. Stat. § 14.101.

K.7. Request for Comments. Copy of GovDelivery Notice sent to all persons on the UST Update Rule subscriber list, with copy of bulletin detail report.

K.8. Request for Comments as posted on the public notice webpage.

L. Comments and materials submitted during the hearing.

L1. Draft modifications to the proposed rule amendments in response to comments received in the Dual-Notice Comment Period.

L.2. Justification for revisions.

L3. Copy of slides from EQB Presentation at the May 31, 2019, rule hearing.

M. Comments and materials submitted during the hearing.[10]

N. Comments and materials submitted during the post-hearing comment period.

O. Comments and materials submitted during the rebuttal period.

P. Exhibits received during the hearing on May 31, 2019.

P.1. United Nations Declaration.

P.2. Treaty Rights discussion.

P.3. Recommendations of Levi Gregg and Lange.

P.4. Information regarding Minnesota's economy (Mr. Tammen).

P.5. Copies of pages from SONAR, special session bill, and article on hydrogen fluoride.

After the close of the June 26, 2019, hearing, the Administrative Law Judge kept the rulemaking record open for 20 calendar days, until July 16, 2019, to allow interested persons and the Board to submit written comments. Thereafter, the record remained open for an additional five business days, until July 23, 2019, to allow interested persons and the Board to file written responses to any comments received during the post-hearing comment period.

Eleven written comments were received from members of the public after the hearings (Ex. Q.1), along with the Board's response (Ex. Q).[11] The Board also submitted rebuttal comments during the rebuttal comment period (Exhibit R). In total, the

[10] The EQB submitted exhibits M, N, and O as "placeholders" during the first public hearing on May 31, 2019. However, the EQB did not submit marked exhibits with these exhibit letters. Instead, exhibits P, Q, and R contain these materials.

[11] In Exhibit Q.1, the EQB listed each comment summary and comment type separately, even where an individual commenter submitted multiple comments. As a result, the EQB's calculation of the number of comments received is significantly higher. The Administrative Law Judge calculated the number of comments based on the number of individual commenters.

Administrative Law Judge received approximately 208 written comments on the proposed rule amendments.[12]

The hearing record closed on July 23, 2019.

SUMMARY OF CONCLUSIONS

The EQB established that it has the statutory authority to adopt the proposed rules and, with three exceptions, that the proposed rules are needed and reasonable.

The Administrative Law Judge disapproves the following three proposed rules based on the standards at Minn. R. 1400.2100 (2017):

(1) Minn. R. 4410.4300, subp. 5, Item B;

(2) Minn. R. 4410.4300, subp. 6; and

(3) Minn. R. 4410.4300, subp. 27, Item B.

In addition, the Administrative Law Judge approves the Board's changes to the rules as published, as described in the Board's July 16, 2019, post-hearing comments.

Based on the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

A. General Background

1. Congress passed the National Environmental Policy Act (NEPA) in 1969, establishing a program to assess environmental impacts of Federal actions. Similarly, in 1973, Minnesota enacted the Minnesota Environmental Policy Act (MEPA). To oversee and carry out MEPA's requirements, the State developed the Environmental Review program and formed the Environmental Quality Board (EQB). The purpose of MEPA's environmental review process is "to investigate public or private projects that have the potential to significantly impact the environment."[13] The goal of the process is the systematic disclosure of information to project proposers, decision-makers, and the public. The environmental review process is designed to work in combination with permits and other approvals.[14]

2. The EQB includes a Governor's representative, who serves as board chair, along with nine state agency heads, and eight citizen members (one from each congressional district). EQB member agencies consist of the following:

[12] The EQB responded to 442 separate comments in its post-hearing response. Ex. Q.1. This format separates individual comment letters into separate comments based on topic. In addition, it includes comments made during the public hearings. *See* Tr. Vols. 1 and 2.
[13] Ex. D at 56.
[14] *Id.* at 56-57.

- Board of Soil and Water Resources
- Department of Administration
- Department of Agriculture
- Department of Commerce
- Department of Employment and Economic Development
- Department of Health
- Department of Natural Resources
- Department of Transportation
- Pollution Control Agency.[15]

3. Projects that meet certain thresholds require environmental review. In these cases, each mandatory category designates a responsible governmental unit (RGU) to conduct the mandatory environmental review using a standard form, either an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS). These classes of projects are known as mandatory EAW categories (4410.4300) and mandatory EIS categories (4410.4400), respectively. Projects that do not fall within these mandatory categories are known as "exemptions categories" or "exemptions."[16]

4. In this rulemaking proceeding, the EQB must establish that the proposed rules are within its statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications the EQB made after the proposed rules were initially published in the State Register are within the scope of the matter that was originally announced.[17]

B. Mandatory Review Categories Rulemaking

5. In 2012, the Minnesota Legislature directed the EQB, the Pollution Control Agency (PCA), the Department of Natural Resources (DNR), and the Department of Transportation (DOT) to evaluate the mandatory environmental review categories. As part of this review, the agencies analyzed potential modifications, eliminations, or maintenance of each mandatory category based on its connection to current permits or federal, state, or local laws. The EQB, PCA, DNR, and DOT finalized this review in the Mandatory Environmental Review Categories (MERC) Report on February 13, 2013.[18]

C. Streamlining Environmental Review Process

6. In 2015, the Minnesota Legislature instructed the EQB to engage in efforts to streamline the environmental review process.[19] The Legislature appropriated $500,000 to the EQB "for activities to streamline the environmental review process."[20] Through this rulemaking, the EQB proposes amendments to the mandatory EAW, EIS, and exemption categories and their supporting definitions. The EQB based the proposed rule amendments

[15] *Id.* at 56.
[16] *Id.* at 57.
[17] Minn. Stat. §§ 14.05, .23, .25, .50.
[18] *Id. See* 2012 Minn. Laws, ch. 150, art. 2, § 3.
[19] 2015 Minn. Laws, 1st Spec. Sess. ch. 4, art. 3, § 2, subd. 5.
[20] *Id.*

on the MERC Report with a focus on "streamlining environmental review by balancing regulatory efficiency and environmental protection."[21]

7. At the May 31, 2019, public hearing, a commenter questioned the EQB's current rulemaking statutory authority based on this one-time appropriation from 2015, noting that the EQB references "streamlining" in various places throughout the SONAR.[22] The Legislature's 2015 appropriation does not grant the EQB rulemaking authority. Instead, the EQB's current rulemaking process is an outgrowth of the streamlining activities the Legislature directed the EQB to engage in at the time the Legislature appropriated funds. The EQB conducts this rulemaking based on its general rulemaking authority under Minn. Stat. § 116D.04, subd. 2a(b) (2018), which does not expire.

D. Silica Sand Rulemaking

8. In 2013, the Legislature established interim mandatory categories for silica sand projects and instructed the EQB to amend its environmental review rules regarding these projects.[23] In the 2013 legislation, the Legislature tasked the EQB with determining whether the silica sand project requirements should vary for different geographic areas of the state.[24] The interim thresholds for silica sand projects were set to expire on July 1, 2015.[25]

9. The EQB formed the Silica Sand Advisory Panel as part of the commencement of its silica sand project rulemaking (R-04157) in 2014. This panel engaged the public and generated technical input for the rulemaking.[26]

10. In 2015, the Legislature removed the July 1, 2015, rulemaking deadline and instead mandated environmental review until the adoption of silica sand rules.[27] The EQB decided to conduct rulemaking to adopt the Legislature's 2013 thresholds.[28] However, in 2017, the Legislature changed the statutory language to give the EQB discretion on whether to conduct silica sand rulemaking. Ultimately, the EQB concluded that it was "needed and reasonable to have the mandatory category thresholds for silica sand project[s] within the environmental review Mandatory Category rules" because of a "continuing potential for significant environmental effects" from Minnesota silica sand projects.[29]

E. Thresholds for Recreational Trails

11. The EQB is also amending its rules relating to recreational trails projects. The 2015 legislation directs the specific environmental review threshold for these projects and

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[21] Ex. D at 57.
[22] Tr. Vol. 1 at 96-97 (K. Hollander).
[23] *See* 2013 Minn. Laws, ch. 114, art. 4, § 105.
[24] *Id*; Ex. D at 57.
[25] Ex. D at 57.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 58.
[29] *Id.*

authorizes changes to EAW thresholds for motorized trails.[30] In 2015, the EQB proposed rules through the "good cause" exemption rulemaking procedure under Minnesota Statutes, section 14.388.[31] However, an Administrative Law Judge did not approve the proposed rule because the EQB failed to establish "good cause."[32] As a result, the EQB suspended the good cause exempt rulemaking process and began the standard rulemaking process as part of this rule.[33]

II. Rulemaking Authority

12. Minn. Stat. § 116D.04, subds. 2a(b), 5a, and 116C.04 (2018) confer specific authority on the EQB to promulgate rules to establish requirements for environmental impact statements and "any additional rules which are reasonably necessary to carry out the requirements of this section." Specifically, Minn. Stat. § 116D.04, subd. 2a(b) requires the Board to conduct rulemaking to establish mandatory categories for EAWs, EISs, and exemptions.[34]

13. The Board is also conducting rulemaking to adopt silica sand project thresholds under Laws of Minnesota 2013, ch. 114, art. 4, section 91 and to establish recreational trails thresholds requiring preparation of an EAW under 2015 Minn. Laws, 1st Spec. Sess, ch. 4, art. 5, § 33.[35]

14. The EQB has statutory authority to adopt the proposed rules.

III. Procedural Requirements of Chapter 14

A. Publications

15. On July 22, 2013, the EQB published Requests for Comments in the State Register, seeking comments on possible amendments to rules governing the Environmental Review Program (Mandatory Categories Rulemaking and Silica Sand Rulemaking).[36]

16. On November 9, 2015, the EQB published Requests for Comments in the State Register seeking comments on possible amendments to rules governing the Environmental Review Program (Mandatory Categories Rulemaking).[37]

17. On October 24, 2016, the EQB published additional Requests for Comments in the State Register seeking comments on the possible amendments to rules governing the Environmental Review Program (Mandatory Categories Rulemaking).[38]

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[30] *Id.* 2015 Minn. Laws, 1st Spec. Sess, ch. 4, art. 5, § 33 mandates recreational trails projects rulemaking.
[31] *Id.;* Ex. D.3.
[32] Exs. D.3.a and D.3.b.
[33] Ex. D.3.
[34] Ex. D at 62.
[35] *Id.*
[36] Ex. A.1. (Revisor's ID Number R-04157 (Mandatory Categories) and R-04196 (Silica Sand)).
[37] Ex. A.2. (Revisor's ID Number R-04157).
[38] Ex. A.3. (Revisor's ID Number R-04157).

18. By letter dated September 27, 2018, the EQB requested review and approval of its Additional Notice Plan and its Dual Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing (Dual Notice), and Notice of Hearing if 25 or More Requests for Hearing are Received under Minn. Stat. § 14.22.[39]

19. On October 10, 2018, the EQB requested withdrawal of its proposed Dual Notice. The EQB indicated that it intended to resubmit its request for review after scheduling an additional hearing and amending the Dual Notice.[40]

20. On October 29, 2018, the EQB filed a new request for review and approval of its Dual Notice under Minn. Stat. § 14.22.[41]

21. On November 1, 2018, Administrative Law Judge Schlatter issued an Order approving the MPCA's Additional Notice Plan and Dual Notice.[42]

22. On November 13, 2018, the EQB published the Dual Notice in the State Register (43 SR 534) stating its intent to adopt rules following the receipt of input from the public. In the Dual Notice, the EQB announced that the first hearing would be held on January 23, 2019, at the MPCA St. Paul Office, 520 Lafayette Road, Saint Paul, MN 55155, if 25 or more persons requested a hearing. The EQB further stated that an additional hearing would be held at the Great River Regional Library, 1300 W St. Germain St., St. Cloud, MN 56301. The EQB listed January 7, 2019, as the deadline for comments.[43]

23. On November 13, 19, and 20, 2018, the EQB emailed a hyperlink to electronic copies of the Dual Notice, the SONAR, and the proposed rule amendments to all persons and associations who had registered their names with the EQB for purposes of receiving such notice,[44] and on November 20, 2018, to all persons and associations identified in its Additional Notice Plan.[45]

24. On December 14, 2018, the EQB filed an amended Dual Notice for review which contained revised dates for the public hearings. Judge Schlatter approved the amended Dual Notice with conditions, noting that the amended Dual Notice lacked amended dates for persons submitting requests for a hearing, or for persons to submit comments to the Board following publication of the Amended Dual Notice.[46]

25. On December 31, 2018, the EQB published the amended Dual Notice in the State Register (43 SR 27) stating its intent to adopt rules following the receipt of input from

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[39] *See* Letter from Erik Cedarleaf Dahl to Chief Administrative Law Judge Tammy Pust (Sept. 27, 2018) (on file with the Minn. Office Admin. Hearings).
[40] *See* Letter from Erik Cedarleaf Dahl to Chief Administrative Law Judge Tammy Pust and Administrative Law Judge LauraSue Schlatter (Oct. 5, 2018) (on file with the Minn. Office Admin. Hearings).
[41] *See* Letter from Erik Cedarleaf Dahl to Chief Administrative Law Judge Tammy Pust and Administrative Law Judge LauraSue Schlatter (Oct. 24, 2018) (on file with the Minn. Office Admin. Hearings).
[42] Order on Review of Additional Notice Plan and Dual Notice (Nov. 1, 2018).
[43] Ex. F.1.
[44] Ex. G.1.
[45] Ex. H.1.
[46] Order on Review of Amended Dual Notice (Dec. 17, 2018). The EQB requested this additional time for comment review and revisions because of a change in administration and Board transition. *See* EQB Post-Hearing Response at 1 (July 16, 2019).

the public. In the amended Dual Notice, the EQB announced it was changing the hearing dates for the rulemaking. The EQB stated that the first hearing would be held on March 8, 2019, at the MPCA St. Paul Office, 520 Lafayette Road, Saint Paul, MN 55155, if 25 or more persons requested a hearing.[47] The EQB further stated that an additional hearing would be held at Great River Regional Library, 1300 W St. Germain St., St. Cloud, MN 56301 on March 12, 2019. The EQB also extended the comment period to February 4, 2019.[48]

26. On December 31, 2018, the EQB emailed a hyperlink to electronic copies of the Dual Notice, SONAR, and the proposed rule amendments to all persons and associations who had registered their names with the EQB for purposes of receiving such notice and to all persons and associations identified in its Additional Notice Plan.[49]

27. The EQB received more than 25 requests for a hearing, including numerous requests for an additional hearing date and time.[50]

28. On February 13, 2019, the EQB notified Judge Schlatter that the Board was canceling and rescheduling the public hearings for the rules scheduled for March 8, 2019, and March 12, 2019.[51] The EQB stated that the Board had been unable to meet about the proposed rules due to lack of a Board chair.[52]

29. On February 15, 2019, the Administrative Law Judge approved the EQB's Notice of Hearing setting the public hearing date for May 31, 2019, at 1:30 p.m. in St. Paul, MN, and cancelling the previously-published hearing dates of March 8 and 12, 2019.[53]

30. On February 25, 2019, the EQB published a Notice of Hearing in the State Register (43 SR 35) setting the public hearing date for May 31, 2019, at 1:30 p.m. at the MPCA St. Paul Office, 520 Lafayette Road North, St. Paul, MN. The EQB further stated that it would video conference the hearing to five additional locations in Baxter, Detroit Lakes, Duluth, Marshall, and Rochester, Minnesota.[54]

31. Between February 20, 2019, and March 6, 2019, the EQB emailed a hyperlink to electronic copies of the Notice of Hearing, SONAR, and the proposed rule amendments to all persons and associations who had registered their names with the EQB for purposes of receiving such notice and to all persons and associations identified in its Additional Notice Plan.[55]

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[47] Ex. F.4.
[48] *Id.* The EQB requested this additional time for comment review and revisions because of a change in administration and Board transition. *See* EQB Post-Hearing Response at 1 (July 16, 2019).
[49] Exs. G.2, H.2
[50] *See generally* Ex. I.
[51] *See* Letter from Erik Cedarleaf Dahl to Administrative Law Judge Schlatter (Feb. 11, 2019).
[52] EQB Post-Hearing Response at 1 (July 16, 2019).
[53] Order on Review of Hearing Notice (Feb. 15, 2019).
[54] Ex. F.6.
[55] Exs. G.3, H.3. The EQB also mailed the Notice of Hearing via the U.S. Postal Service. Ex. H.3.

32. On April 19, 2019, the EQB submitted a new Notice of Hearing for review under Minn. R. 1400.2080. Judge Schlatter approved the Notice of Hearing.[56]

33. On May 7, 2019, the EQB submitted a subsequent Notice of Hearing for review under Minn. R. 1400.2080. Judge Schlatter approved the Notice of Hearing.[57]

34. On May 20, 2019, the EQB published a final Notice of Hearing in the State Register, adding an additional hearing date in St. Cloud, Minnesota on June 26, 2019, at 5:30 p.m.[58]

35. On May 20, 2019, the EQB emailed a hyperlink to electronic copies of the Notice of Hearing, SONAR, and the proposed rule amendments to all persons and associations who had registered their names with the EQB for purposes of receiving such notice,[59] and on May 17, 2019, to all persons and associations identified in its Additional Notice Plan.[60]

36. At the hearing on May 31, 2019, the EQB filed copies of Exhibits A-O, and the Administrative Law Judge received them into evidence.[61]

B. Additional Notice Requirements

37. Minn. Stat. §§ 14.131, .23 require that an agency include in the SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

38. On November 20, 2018, the EQB provided a copy of the first Dual Notice to persons and groups detailed in its approved Additional Notice Plan.[62]

39. On December 31, 2018, the EQB provided an amended copy of the Dual Notice to persons and groups detailed in its approved Additional Notice Plan.[63]

40. Between February 20 and March 6, 2019, the EQB provided a Notice of Hearing to persons and groups detailed in its approved Additional Notice Plan.[64]

41. On May 20, 2019, the EQB provided a Notice of Hearing and Additional Comment Period to persons and groups detailed in its approved Additional Notice Plan.[65]

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[56] Order on Review of Hearing Notice (Apr. 23, 2019).
[57] Order on Additional Review of Hearing Notice (May 8, 2019).
[58] Ex. F.8.
[59] Exs. G.4 and H.4.
[60] Ex. H.4.
[61] *See* Minn. R. 1400.2220 (2017).
[62] Exs. G, H.
[63] Exs. G, H.
[64] Exs. G, H.
[65] Exs. G, H.

42. If the agency implements an approved additional notice plan, the order approving the additional notice plan is the final determination by the Office of Administrative Hearings that the additional notice plan is adequate.[66]

43. The Board met the additional notice requirements of Minn. Stat. §§ 14.131, .23.

C. Notice Practice

i. Notice to Stakeholders

a. First Dual Notice Comment Period

44. On November 20, 2018, the EQB provided a copy of the Dual Notice to stakeholders identified in its Additional Notice Plan.[67]

45. On November 13, November 19, and November 20, 2018, the EQB provided a copy of the Dual Notice to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[68]

46. The initial comment period on the proposed rules expired at 4:30 p.m. on January 7, 2019.[69]

47. The EQB complied with Minn. R. 1400.2080, subp. 6 (2017), by mailing the Dual Notice "at least 33 days before the end of the comment period . . . ." to stakeholders identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

b. Second Dual Notice Comment Period

48. On December 31, 2018, the EQB provided a copy of the Amended Dual Notice to stakeholders identified in its Additional Notice Plan.[70]

49. On December 31, 2018, the EQB provided a copy of the Amended Dual Notice to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[71]

50. The second comment period on the proposed rules expired at 4:30 p.m. on February 4, 2019.[72]

51. The EQB complied with Minn. R. 1400.2080, subp. 6 (2017), by mailing the Dual Notice "at least 33 days before the end of the comment period . . . ." to stakeholders

[66] Minn. R. 1400.2060, subp. 4 (2017).
[67] Ex. H.
[68] Ex. G.
[69] Ex. F.2 at 247.
[70] Ex. H.
[71] Ex. G.
[72] Ex. F.3 at 264.

identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

c. Third Comment Period

52. On February 20, 2019, February 25, 2019, and March 6, 2019, the EQB provided a copy of the Hearing Notice for the hearing set for May 31, 2019, to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[73]

53. Between February 20, 2019, and March 6, 2019, the EQB gave notice to the parties listed in the Additional Notice Plan via electronic GovDelivery, direct emails, and United States Postal Service.[74]

54. The EQB complied with Minn. R. 1400.2080, subp. 6, by mailing the Notice of Hearing "at least 33 days before . . . the start of the hearing . . . ." to stakeholders identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

55. On May 20, 2019, the EQB provided an electronic copy of the Hearing Notice, adding June 26, 2019, as an additional hearing date, to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[75]

56. On May 17, 2019, the EQB gave notice to the parties listed in the Additional Notice Plan via electronic GovDelivery, direct emails, and United States Postal Service.[76]

57. The third comment period ended at 4:30 p.m. on June 21, 2019.[77]

58. The EQB complied with Minn. R. 1400.2080, subp. 6, by mailing the Notice of Hearing "at least 33 days before the start of the hearing . . . ." to stakeholders identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

ii. Notice to Legislators

59. Minn. Stat. § 14.116 (2018) requires an agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators when it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan as required by Minn. Stat. § 14.22.

60. On November 20, 2018, the EQB mailed a copy of the Dual Notice and SONAR to legislators.[78]

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[73] Ex. G.3. The Notice of Hearing published in the State Register on February 25, 2019, did not contain an end date for the submission of public comments. *See* Ex. F.6.
[74] Ex. H.3.
[75] Ex. G.4.
[76] Ex. H.4.
[77] Ex. F.8 at 292.
[78] Ex. K.2.a.

61. On December 28, 2018, the EQB mailed a copy of the Amended Dual Notice and SONAR to legislators.[79]

62. The EQB provided the Dual Notice to the legislators at least 33 days before the end of the comment period.

63. Minn. Stat. § 14.116 requires the EQB to send a copy of the notice of intent to adopt rules under section 14.14 or 14.22 when it mails such a notice. The EQB published its first Notice of Intent to Adopt Rules after a public hearing (Hearing Notice) in the State Register on February 25, 2019, giving notice of the May 31, 2019, public hearing. It published a second Hearing Notice on May 20, 2019, adding an additional hearing on June 26, 2019. Nothing in the record demonstrates that the EQB provided notice to the legislators when it published its either the February 25, 2019, Hearing Notice, or the May 20, 2019, Hearing Notice.

64. Minn. Stat. § 14.116, requires an agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators when it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan as required by Minn. Stat. § 14.22.

65. Nonetheless, the Administrative Law Judge concludes that the EQB's failure to mail the Notice of Hearing to legislators when it mailed when it published the February 25, 2019, Hearing Notice, and the May 20, 2019, Hearing Notice was harmless error under Minn. Stat. § 14.15, subd. 5. The Administrative Law Judge shall disregard a procedural error made by the EQB if the Administrative Law Judge finds that the error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process . . . ."[80]

66. The later-mailing to legislators did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

67. The EQB did provide the required dual notices to legislators in November and December, 2018. None of the legislators who received notice requested a hearing or submitted a comment during the comment period.

68. Representative Dale Lueck, a legislator who was not required to be notified pursuant to Minn. Stat. § 14.116, did submit comments.[81] The EQB reviewed and responded to Rep. Lueck's comments.[82]

69. The EQB individually notified each person who requested a hearing during the Dual Notice comment period that a hearing would be held.[83]

70. Based on these findings, the Administrative Law Judge concludes that the EQB's failure to serve the legislators with the Notice of Hearing as required by Minn. Stat.

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[79] Ex. K.2.c.
[80] Minn. Stat. § 14.15, subd. 5(1).
[81] Ex. I.10.
[82] Ex. Q at 30, 46-48, 50.
[83] Exs. G, H.

§ 14.14 was harmless error pursuant to Minn. Stat. § 14.15, subd. 5 (2). The Administrative Law Judge cautions the EQB that the law requires that legislators receive notice of an intent to adopt a rule when notice to stakeholders required by Minn. Stat. §§ 14.14 or 14.22 is provided.

iii. Notice to the Legislative Reference Library

71. Minn. Stat. § 14.23 provides that an agency must send a copy of the SONAR to the Legislative Reference Library when the Dual Notice is mailed.

72. November 19, 2018, the EQB submitted a copy of the SONAR by email to the Legislative Reference Library.[84]

73. The EQB submitted the SONAR as required by Minn. Stat. § 14.23.

D. Impact on Farming Operations

74. Additional notice requirements exist when proposed rules affect farming operations.[85] In that circumstance, an agency must provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the State Register.

75. The proposed rules at issue have an impact on farming operations.[86] As a result, the EQB was required to notify the Commissioner of Agriculture of the proposed rule changes. On September 27, 2018, the EQB provided the Commissioner of Agriculture and four additional officials within the Department of Agriculture a letter via intraoffice mail which included the notice of the proposed rule, along with a copy of the draft rule and SONAR.[87]

E. Statutory Requirements for the SONAR

76. An agency adopting rules must address eight factors in its SONAR.[88] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

[84] Ex. E.
[85] Minn. Stat. § 14.111.
[86] Ex. D at 119.
[87] Ex. K.1.b.
[88] Minn. Stat. § 14.131 (2018).

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

i. The Board's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

77. The EQB states that the primary class of persons that the proposed rule changes will affect are individuals "who propose to develop projects in Minnesota that have, or may have the potential for significant environmental effects."[89] According to the EQB, the developers of projects that require an EAW or EIS under the proposed rules would incur the greatest economic impact.[90]

78. The EQB contends that the proposed rules will have a nominal effect on costs to project proposers or RGUs because most of the proposed rule changes are an effort to align the agency's regulations with state statutes, and provide increased "clarity and certainty for EQB project proposers, RGUs and citizens," in determining which projects require environmental review.[91] The EQB predicts that this will reduce costs as the result of shorter processing times and reductions in staff time needed to determine a project's environmental review status.[92]

79. The EQB provided detailed analysis of the classes of persons that the proposed rule amendments may impact, along with information on which classes will bear

[89] Ex. D. at 108.
[90] *Id*.
[91] *Id.*
[92] *Id.*

the costs and benefits from the proposed rule. For the rules that received comments, the Board's more detailed analysis, and the impact of the proposed rules on specific classes is discussed in further detail, as summarized below:

(i) Minn. R. 4410.0200 (Definitions)

80. The EQB does not anticipate changes in cost to RGUs, proposers, EQB, and citizens. Further, the EQB asserts that proposed amendments will benefit affected classes "by increasing clarity and aligning definitions with other applicable regulatory requirements."[93] The EQB is uncertain whether definitional changes will increase or decrease the amount of environmental review.[94]

(ii) Minn. R. 4410.4300, subp. 3 (Electric-Generating Facilities)

81. The EQB notes that the proposed changes in item A of this rule part will reduce costs for the EQB because of increased efficiency in referring responsibility for proposed projects directly to the PCA.[95]

82. Like item A, in item B the EQB proposes to reduce the number of procedural steps by referring the review process directly to another agency. Specifically, the EQB proposes to have LGUs review proposals for projects that will generate between 25-50 megawatts of electricity. However, the EQB anticipates this change will increase costs for the LGUs because the LGU "will always be the RGU."[96] The EQB reviewed prior project records and determined that since 2011, 13 projects fell into this category, with one between 25-50 megawatts that would have led to an LGU-conducted EAW. The EQB asserts that the LGU could establish an ordinance requiring project proposers to pay EAW costs.[97]

83. Like the changes in item A, the EQB asserts that under the proposed changes to items C and D, the EQB will refer proposed projects directly to the PUC, thereby reducing EQB's costs.[98]

(iii) Minn. R. 4410.4300, subp. 4 (Petroleum Refineries)

84. The EQB does not anticipate changes in costs for the EQB, proposers, or RGUs under this rule part.[99]

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 109.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*

(iv) Minn. R. 4410.4300, subp. 5 (Fuel Conversion Facilities)

85. The EQB asserts that the addition of the phrase "new fuel conversion" to items A and B should lower costs for proposers and RGUs because it will aid these groups in determining which projects require environmental review.[100]

86. The EQB anticipates that the deletion of the term "or expansion" in item B will reduces the number of EAWs in this category, which in turn will lower costs for proposers and the RGU. The EQB asserts that the other language change in item B (deleting "or would increase its capacity" and changing it to "a capacity") will offer increased certainty on when a new fuel conversion facility requires environmental review.[101]

87. For item C, the EQB also contends that the proposed change will lead to greater clarity and certainty for proposers, RGUs, and citizens to determine which projects require mandatory environmental review.[102]

(v) Minn. R. 4410.4300, subp. 6 (Transmission Lines)

88. The EQB anticipates minimal cost impact for proposers, RGUs, the EQB, or citizens, and asserts that the proposed changes, which align rule language with other provisions of Minnesota rule and statute "will provide more ease of access."[103]

89. Further, the RGU change from EQB to PUC should lower the EQB's costs by reducing process steps.[104]

(vi) Minn. R. 4410.4300, subp. 8 (Transfer Facilities)

90. The EQB does not anticipate an effect on cost to the EQB, RGUs, citizens, or proposers because the proposed change incorporates existing statutory language on environmental review threshold requirements.[105]

(vii) Minn. R. 4410.4300, subp. 10 (Storage Facilities)

91. For item A, the EQB asserts that the proposed rule is "a simple readability change" which should not impact costs to the EQB, RGUs, citizens, or proposers.[106] Similarly, the proposed language change to item B should provide additional clarity for the RGU, proposers, and citizens to determine when a facility must complete an EAW. Additional language changes in item B increase readability and, according to the EQB, should not affect costs.[107]

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[100] *Id.*
[101] *Id.*
[102] *Id.* at 110.
[103] *Id.*
[104] *Id.* For proposed transmission line projects, the EQB will no longer need to re-designate the RGU.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 111.

92. The EQB notes that item C is "completely new" language and that the RGU and proposers will see increased costs based on the completion of more EAWs. The EQB asserts that the PCA and proposers, but not small municipalities, will face increased costs.[108] For item D, the EQB offers a similar analysis of the impact of the proposed rule language.[109]

93. In Item E, the EQB proposes to insert statutory definitions of "liquefied natural gas" and "synthetic natural gas" into the proposed rule language to increase clarity for the RGU, proposers, and the EQB. In addition, the EQB states that deleting the PCA as the RGU and adding the PUC "aligns with statute and PUC's jurisdictional authority and expertise." The EQB contends that this change will reduce the EQB's time and costs because the EQB will not be required to re-designate the RGU to the PUC for proposed projects.[110]

94. The EQB asserts that the PCA and the EQB will both benefit from the elimination of their role as an RGU for item F (anhydrous ammonia), although the MDA, as the new RGU, may have increased costs. According to the EQB, this change may also increase costs for proposers because the MDA may more closely examine these projects. The EQB contends that this change will benefit all Minnesotans "because anhydrous ammonia facilities will undergo environmental review by a state agency that already tracks the location and size of these facilities."[111]

95. Like other proposed rule changes, the EQB states that the proposed changes in item G integrating current statutory definitions (for "liquefied natural gas" and "synthetic natural gas") into the proposed rule language will provide increased clarity for the RGU, proposers, and the EQB.[112] As stated in other items, the proposed change removing the PCA as the RGU and replacing it with the PUC aligns the proposed rule change with statute. The EQB asserts that this change will remove the need for the EQB to subsequently re-designate the RGU to the PUC for proposed projects.[113]

(viii) Minn. R. 4410.4300. subp. 17 (Solid Waste)

96. The EQB asserts that the change to item A to add clarity will not influence costs for proposers, the RGU (PCA) or the EQB.[114]

97. For item B, the EQB contends that the added language will increase clarity regarding the threshold for application of the mandatory EAW. The EQB notes that this change may or may not increase costs for proposers and the RGU. However, the EQB

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[108] *Id.* However, the EQB states that it has "no record of any projects of this type being proposed in the last 10 years." *Id.*

[109] *Id.* The EQB states that "[i]t is unknown how much this change may cost for proposers or the RGU because it is new and it is unclear to EQB how many projects may occur in the future." *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 113. The EQB proposes to add the word "land" into the category to indicate that the category is for locations on land with solid waste. *Id.*

believes this change will provide a benefit for proposers, the RGU, and citizens because it will create more certainty in how to compute the mandatory threshold.[115]

98. The EQB states that the proposed changes in items E-F also add clarity for RGUs, proposers, and citizens. The EQB is unaware if the change will impact costs for those groups.[116]

(ix) Minn. R. 4410.4300, subp. 22 (Highway Projects)

99. The EQB anticipates fewer costs to the EQB, proposers, and RGUs following the proposed changes. As the EQB maintains, an increase in the threshold for application of the EAW will reduce the number of EAWs that are filed and reviewed.[117]

(x) Minn. R. 4410.4300, subp. 26 (Stream Diversion)

100. The EQB asserts that the proposed change that designates either the "DNR or LGU" as the RGU "may or may not" reduce costs for a proposed project. According to the EQB, proposers may see a reduction in time and costs, because of a decrease in the EQB re-designation process steps, if an LGU requests that the DNR be the RGU, which "occurs often."[118]

(xi) Minn. R. 4410.4300, subp. 27 (Wetlands and Public Waters)

101. The EQB states that the change in the category title will not have costs for proposers, the EQB, RGUs, or citizens.[119]

102. For the proposed change to item A, the EQB asserts that the change "may or may not" reduce proposed project costs. According to the EQB, proposers may see a reduction in time and costs because of a decrease in EQB process steps.[120]

103. In item B, the EQB acknowledges costs may increase for project proposers if the project meets the mandatory threshold. The EQB contends that the language changes will simplify determinations regarding the mandatory threshold for environmental review. The EQB maintains:

> From this perspective, the simplification in language will reduce costs for the RGU and potentially the project proposer due to the renewed ease of determining if a project requires environmental review. Although, the change in "cause an impact" of "one or more acre or wetland" may increase costs for project proposers that impact wetlands with a proposed project due to clarity

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[115] *Id.*

[116] *Id.* The EQB states that the current threshold "is related to the 'capacity' of a site which EQB assumes would be the 'permitted capacity' and thus there should be no change to the number of environmental reviews required. The word 'permitted' is incorporated to provide more clarity that the threshold is derived from that which is permitted, not a 'potential' or 'designed' capacity." *Id.*

[117] *Id.* at 114.

[118] *Id.*

[119] *Id.*

[120] *Id.* Similar to the EQB's analysis for the Stream Diversion rule changes (above).

and removal of a confusing formula and replacement with a simple threshold. This may mean more Environmental Assessment Worksheets (EAW) will be required and thus increase costs for proposers and RGUs. All other changes to item B are for readability and will have no effect on cost.[121]

(xii) Minn. R. 4410.4300, subp. 36 (Land Use Conversions, including Golf Courses)

104. The EQB asserts this change is a housekeeping change with no anticipated change in costs to the EQB, proposers, and RGUs.[122]

(xiv) Minn. R. 4410.4300, subp. 36a (Land Conversions in Shoreland)

105. The EQB states that the added language provides more clarity and consistency in the proposed rules and should have minimal impact on costs for the EQB, proposers, the RGUs, and LGUs.[123]

(xv) Minn. R. 4410.4300, subp. 37 (Recreational Trails)

106. The EQB contends that the EQB's costs will decrease "due to clarity and certainty" regarding whether a given project is subject to, or excluded from, mandatory environmental review by the Legislature."[124]

(xvi) Minn. R. 4410.4400

107. The EQB asserts that the proposed changes to Minnesota Rules 4410.4400 will have minimal (or no) change in costs for the EQB, proposers, or RGUs.[125]

(xvii) Minn. R. 4410.4600

108. The EQB contends that the proposed changes to Minnesota Rules 4410.4600 will have minimal (or no) change in costs for the EQB, proposers, or RGUs.[126]

(b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

109. The EQB does not expect a significant increase in state costs from the proposed rule amendments because the amendments clarify current environmental review program practices and mandatory EAW and EIS category thresholds.[127] Under existing rules, the state incurs costs for EQB staff time and staff resources to provide technical

[121] *Id.* at 114-115.
[122] *Id.* at 115.
[123] *Id.*
[124] *Id.* The EQB cites 2015 Minn. Laws ch. 4, § 33. The correct citation is 2015 Minn. Laws, 1st Spec. Sess., ch. 4, art. 5, § 33.
[125] *Id.* at 115.
[126] *Id.* at 116.
[127] *Id.*

assistance to stakeholders (citizens, project proposers, and RGUs). The EQB maintains that one of the goals of the proposed rule amendments is to lower EQB staff time for processing requests to designate different RGUs and to make determinations about mandatory EAW and EIS category thresholds. In addition, the EQB asserts that these time and cost savings will benefit project proposers and RGUs.[128]

110. The EQB acknowledges that RGUs that oversee the environmental review process are often state agencies and local governments. The process frequently includes an EAW or EIS. As a result, the EQB recognizes that state agencies and local governments may see some fluctuations in costs as some projects not previously captured by the thresholds may require environmental review under the proposed rule amendments.[129] The EQB points to Section (a) (above) for further detail on categories where other agencies may see increased costs based on the proposed changes.[130]

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

111. The EQB explains that most of the proposed rule amendments involve technical changes and alignment of state rule with state statutes, which the EQB asserts will bring efficiencies to all classes of people impacted by the changes. Rulemaking, per the EQB, is the most direct way to implement necessary technical and statutory changes to its rules.[131]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule.

112. The EQB considered not conducting rulemaking. However, the EQB rejected this alternative because it would not have addressed the EQB's goals of clarifying and updating the rules, making technical changes, and streamlining its regulations.[132]

113. Additionally, the EQB points out that the Minnesota Legislature directed rulemaking for some of the changes, particularly regarding recreational trails. Therefore, the EQB states it had limited options for the proposed changes and that these changes could not be addressed through agency policy, development of guidance, or interpretation of internal rules.[133]

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[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 117.
[133] *Id.*

(e) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

114. The EQB states that the potential or probable costs are detailed in Section (a) (above) and asserts that "[e]nvironmental review costs are project and RGU dependent." The EQB further asserts that it is difficult to determine costs because "the complexity and location of a proposed project plays a significant factor in determining costs for affected parties."[134]

115. The Administrative Law Judge finds the EQB's cost analysis is reasonable.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

116. The EQB contends that if the rules are not adopted, the regulations will not reflect statutory requirements, and the proper procedures will not be clear to proposers, LGUs, RGUS, and citizens. Section (a) (above) provides more detail about the potential or probable costs or consequences of failure to adopt the proposed rules. The EQB asserts that costs will vary based on the project and RGU and that the costs are "wide ranging and difficult to ascertain since the complexity and location of a proposed project plays a significant factor in determining costs for affected parties."[135]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

117. The EQB assessed the differences between the proposed Minnesota rules and the existing federal regulations and explained its reasoning for each difference.[136] The EQB notes that certain projects may require dual federal (NEPA) and state (MEPA) review, primarily public projects (highways, water resources projects, or wastewater collection and treatment). The EQB states that both the federal and state processes require similar documentation and procedures. Further, the EQB contends that where dual review is necessary, the state environmental rules (Minn. R. 4410.1300, .3900) "provide for joint state-federal review with one set of environmental documents to avoid duplication of effort."[137] The EQB asserts that the proposed rule amendments do not impact Minn. R. 4410.1300 and .3900.[138]

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* Minn. R. 4410.1300 authorizes the substitution of a federal Environmental Assessment document for a state EAW document. Minn. R. 4410.3900 authorizes joint state and federal review in general. *Id.*

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

118. Minn. Stat. § 14.131 defines "cumulative effect" as "the impact that results from incremental impact of the proposed rule in addition to the other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time."

119. The EQB asserts that the proposed rules have no cumulative effect with other federal and state regulations linked to environmental review. According to the EQB:

> The 4410 rules cover the process, definitions, mandatory thresholds for EAW and EIS and exclusions and have no relation to federal and state regulations because environmental review is not a regulation per se, it is an exercise in fact finding and due diligence to develop a project that will not have the potential for significant environmental effects.[139]

120. The Administrative Law Judge concludes the Board has completed an appropriate assessment of the eight factors set forth in Minn. Stat. § 14.131, in the text of its SONAR.

ii. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

121. As required by Minn. Stat. § 14.131, the EQB consulted with MMB to evaluate the fiscal impact and benefit of the proposed rules on local units of government.[140] MMB reviewed the proposed rule changes and the SONAR and consulted with agency staff to determine the local fiscal impact of the proposed changes.[141]

122. MMB prepared a chart that analyzes the potential local impact from the proposed rules.[142] According to MMB, only two of the proposed rule amendments, Minn. R. 4410.4300, subp. 3, item B, and Minn. R. 4410.4300, subp. 27, appear to increase costs to local governments. MMB concludes that the remaining proposed rule amendments "should have little or no effect on, or decrease, the costs to local government units."[143]

123. Minn. R. 4410.4300, subp. 3, item B covers electric-generating facilities. MMB notes that local governments may see increased costs if a proposed project meets the rule's threshold. Under the proposed amendment, local governments serve as RGUs and have responsibility for the environmental review process. MMB reviewed MCPA records and found that 13 projects fell into this category over the last 10 years, but only one project would have met item B's threshold. To mitigate potential costs, MMB suggests that "local

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[139] *Id.* at 118.
[140] *See* Exs. D at 122, D.5.
[141] Ex. D.5.
[142] *Id.*
[143] *Id.* MMB notes costs may decrease under the proposed rule amendments to Minn. R. 4410.4300, subp. 22 (highway projects), subp. 37 (recreational trails), and 4410.4600, subp. 27 (recreational trails). *Id.* at 232-233.

government units have the option of creating a local ordinance to require project proposers to pay the costs of an environmental assessment worksheet."[144]

124. Minn. R. 4410.4300, subp. 27 concerns wetlands and public waters. MMB is uncertain if costs to local governments will increase due to this proposed amendment. MMB notes that the "amendment clarifies and simplifies rule language" such that "local government units will potentially apply the rule more frequently and incur additional costs."[145]

125. In connection with MMB's consideration of the fiscal impact on local units of government, multiple commenters from Minnesota counties maintained that the EQB should have consulted with MMB prior to publishing the proposed amendments to Minn. R. 4410.4300, subp. 27 because of the possibility of significant cost increases for counties.[146]

126. The EQB responded to the commenters' concern, acknowledging that the current version of the SONAR "is in error," and pointed to the MMB's letter dated September 4, 2018. The EQB notes that it included a copy of this letter in the EQB Board packet for the Board's September 19, 2018, public meeting and that it is attached to the SONAR as Exhibit 5. Per the MMB, "the EQB is uncertain if the amendment to part 4410.4300, subpart 27 regarding wetlands and public waters will increase costs for local governments. Because this amendment clarifies and simplifies rule language, local government units will potentially apply the rule more frequently and incur additional costs."[147]

127. Commenters also expressed concerns about delays in project delivery timelines and stated that the MMB's assessment should consider this impact when analyzing potential costs. Commenters anticipated delays of 12 months or more due to EAW preparation and cited increased costs for bridge replacement projects and larger road construction projects.[148]

128. The EQB responded to these concerns, stating that the EAW "is a brief document that should not delay project delivery timelines."[149] Additionally, the EQB noted that applicable road and bridge projects will be excluded from environmental review, a point that the EQB clarified when it introduced the proposed revision in Exhibit L.1 during the May 31, 2019, public hearing.[150]

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[144] *Id.*
[145] *Id.*
[146] Exs. I.1, I.5, I.22, I.23, I.26, I.28, I.29, I.30, I.31, I.32, I.33, I.34, I.40, I.50, I.51, I.52, I.53, I.54, I.63, I.83, I.84, I.87, I.88, I.97, I.98, I.109, I.126, I.151, and I.156. The commenters stated that pursuant to the SONAR, the EQB had intended to, but had not yet, consulted with MMB.
[147] Ex. Q at 41.
[148] Exs. I.1, I.5, I.22, I.23, I.26, I.28, I.29, I.30, I.31, I.32, I.33, I.34, I.40, I.50, I.51, I.52, I.53, I.54, I.63, I.83, I.84, I.87, I.88, I.97, I.98, I.109, I.126, I.151, and I.156.
[149] Ex. Q at 41.
[150] *Id.* at 41.

iii. Performance-Based Regulation

129. The APA requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[151]

130. The EQB notes that the aim of the environmental review program is to gather information about possible environmental effects of proposed projects, along with ways to avoid or mitigate these effects.[152] According to the EQB, the proposed rules allow for flexibility in obtaining this information.[153] Although the rules stipulate the kinds of information the RGU must gather, the EQB asserts that the RGU chooses how to acquire the information.[154] The EQB states that only one of the proposed amendments impacts environmental review procedures because the amendment streamlines RGU determinations at an earlier part of the review process. The EQB asserts that the remainder of the proposed amendments make "minor adjustments to the thresholds at which review is required."[155] Additionally, the EQB contends that "environmental review is not a regulatory program, and hence the EQB has no 'regulatory objectives' in this rulemaking."[156]

131. At the public hearing on May 31, 2019, one commenter disputed the EQB's contention that it has no regulatory objectives in this rulemaking.[157] However, in its SONAR, as described above, the EQB states that "environmental review is not a regulation per se, it is an exercise in fact finding and due diligence to develop a project that will not have the potential for significant environmental effects." As a result, the EQB contends that it lacks specific outcomes for the environment in this rulemaking.[158]

iv. Summary

132. The EQB has complied with Minn. Stat. § 14.131 in assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

133. Minn. Stat. §14.127 (2018) requires agencies to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The agency

[151] Minn. Stat. §§ 14.002, .131.
[152] Ex. D at 121.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Tr. Vol. 1 at 93-94 (J. Munter).
[158] Ex. D at 118.

must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[159]

134. The EQB determined that the estimated cost of complying with the proposed rules "may or may not exceed" the $25,000 threshold for any business or city.[160] The EQB provides a breakdown of potential or probable costs of adopting the proposed rules.[161] According to the EQB, local units of government "prepare approximately two-thirds of the total environmental review documents each year, and eighty-percent of the total projects are reviewed using the EAW process."[162]

135. According to the Board, potential costs of individual projects are difficult to measure. Costs "vary based on the adequacy of the data submitted to the RGU, the complexity of the project, the project's location and proximity to sensitive resources, and the level of controversy."[163] The EQB states that it lacks historical project data because the EQB delegates its authority to prepare and approve environmental documents. To develop a greater understanding of RGU costs, the EQB sent out a survey, but did not receive substantive responses. The 2017 survey indicated an average RGU environmental review cost of $35,960, with an overall range of $200 to $75,000.[164]

136. The Board contacted multiple local governments and state agencies who serve as RGUs for projects that necessitate environmental review. These RGUs stated that EAW costs ranged from $1,500 to $368,600. The EQB highlighted examples from the Lilydale Regional Park Master Plan,[165] CHS Field in St. Paul, MN,[166] and Scott County mining projects to show how EAW costs may vary based on project complexity.[167]

137. The EQB asserts that local government units "have the option of creating a local ordinance to require project proposers to pay the costs of an environmental assessment worksheet" to alleviate EAW costs.[168]

138. The Administrative Law Judge concludes that the EQB properly performed the analysis required by Minn. Stat. § 14.127.

139. Based on the EQB's analysis, the Administrative Law Judge finds:

(a) for some small cities, as defined in Minn. Stat. § 14.127, the new, transferred review duties will trigger compliance costs in the first year which may be greater than $25,000; and

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[159] Minn. Stat. § 14.127, subds. 1-2.
[160] Ex. D at 122.
[161] *See* Part i, Section (a) of this Report (above).
[162] Ex. D at 122.
[163] *Id.*
[164] *Id.* The EQB states that "[i]t is worth noting there was a small sample size related to RGU costs and a large range reported." *Id.*
[165] Ex. D at 122. The estimated EAW cost was between $18,889 to $28,058.
[166] *Id.* The estimated proposed EAW cost was $368,600.
[167] *Id.* at 123. Scott County estimated an EAW cost range between $17,000 to $53,000, with an estimated EIS cost of $232,000.
[168] Ex. D at 123.

(b) that determination, pursuant to Minn. Stat. § 14.127, subd. 3, entitles those small cities whose costs will be greater than $25,000 to claim a temporary exemption from compliance with the rules (*id.)*, unless the temporary exemption is waived by the Governor pursuant to Minn. Stat. § 14.127, subd. 4 (e).

G. Adoption or Amendment of Local Ordinances

140. Under Minn. Stat. § 14.128 (2018), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[169]

141. The EQB determined that the proposed amendments will not have any effect on local ordinances or regulations.[170] While LGUs may choose to amend or pass ordinances or regulations to recover or reduce their costs, the proposed amendments do not require such action.

142. The EQB has made the determination required by Minn. Stat. § 14.128 and the Administrative Law Judge approves that determination.

IV. Rulemaking Legal Standards

143. A rulemaking proceeding under the APA must include the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[171]

144. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[172] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a case, but which guide the development of law and policy),[173] and the agency's interpretation of related statutes.[174]

145. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[175]

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[169] Minn. Stat. § 14.128, subd. 1.
[170] Ex. D at 122.
[171] *See* Minn. R. 1400.2100.
[172] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[173] *See United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[174] *See Mammenga v. Agency of Human Servs.*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[175] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

146. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim or devoid of articulated reasons, or if it "represents its will and not its judgment."[176]

147. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[177]

148. There was significant comment during the comment periods regarding the effects of proposed changes to Minn. R. 4410.4300, subp. 7 (Pipelines) and Minn. R. 4410.4400, subp. 8 (Metallic Mineral Mining and Processing). At the May 31, 2019, public hearing, the EQB announced that it was withdrawing the proposed changes to both of these rule parts.[178] Therefore, discussion of the effects of the changes initially proposed to them is immaterial. The EQB also set forth proposed changes to Minn. R. 4410.4300, subp. 27 (Wetlands).[179] These proposed changes are discussed in detail at Section VI.

149. Because the Board proposed changes to the proposed rule language after the date it was originally published in the State Register, it is also necessary to address whether this new language is substantially different from the language as originally proposed.

150. Minn. Stat., § 14.05, subd. 2(b) details the standards used to determine whether any changes to proposed rules create a substantially different rule. A modification does not make a proposed rule substantially different if:

(1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;

(2) the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and

(3) the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."[180]

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[176] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[177] *Minn. Chamber of Commerce*, 469 N.W.2d at 103; *see also Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[178] Tr. Vol. 1 at 40-43 (E. Cedarleaf Dahl and D. Wilson).
[179] Ex. L.3 at 39. The EQB also corrected a scrivener's or clerical error to Minn. R. 4410.4300, subp. 3 (Electric-Generating Facilities). *See* EQB Response to Comments at 5 (July 16, 2019).
[180] Minn. Stat. § 14.05, subd. 2(b).

151. When determining whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether:

> (1) persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;
>
> (2) subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and
>
> (3) the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.[181]

V. Rule by Rule Analysis

152. The role of the Administrative Law Judge during a legal review of rules is to determine whether the agency has made a reasonable selection among the regulatory options that it has available. A judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. The delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the APA begins with this important premise.[182]

153. The EQB received several comments objecting to the rules generally. For the most part, these rules or rule parts are not addressed in this Report.

154. The EQB also received general comments of support for some of the rules.[183] Additionally, some commenters provided comments that did not relate to the EQB's proposed language changes.[184] The EQB responded to these comments, stating that the comments did not relate to the EQB's current proposed changes, but that the comments may be considered in future rulemaking.[185]

155. The EQB received multiple comments on rule parts where the EQB proposed no changes: Minn. R. 4410.4300, subp. 24; .4400, subps. 18, 27; 4410.4600, subps. 15, 17, and .4600, subp. 21. Pursuant to Minn. R. 1400.2070, subp. 1 (2017), the EQB is not required to justify provisions in its existing rules that have already been adopted and that

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[181] *See id.*, subd. 2(c).

[182] *See Manufactured Hous. Inst.,* 347 N.W.2d at 244 (instructing the state courts to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also In re the Proposed Rules of the Minn. Pollution Control Agency Governing Permits for Greenhouse Gas Emissions,* No. 8-2200-22910-1, REPORT OF THE ADMINISTRATIVE LAW JUDGE at 20 (Minn. Office Admin. Hearings Nov. 9, 2012).

[183] *See* Ex. Q (comments on Minn. R. 4410.4300, subp. 8: Transfer Facilities, and Minn. R. 4410.0200, subp. 93: Wetlands).

[184] Minn. R. 4410.0200, subp. 5a (Auxiliary Lane); .4300, subp. 4 (Petroleum Refineries); .4300, subp. 17 (Solid Waste); .4300, subp. 26 (Stream Diversion); .4300, subp. 28 (Forestry);.4300, subp. 36 (Land Use Conversion); .4300, subp. 36a (Land Conversions in Shoreland); .4400, subp. 4 (Petroleum Refineries); .4600, subp. 18 (Agriculture and Forestry). *See* Ex. Q.

[185] *See* Ex. Q for additional detail.

the EQB is not amending.[186] These comments, therefore, are outside of the scope of review of the current rulemaking.

156. This Report does address the portions of the proposed rules that prompted genuine dispute by commenters as to the reasonableness of the EQB's regulatory choice or issues raised in this proceeding that otherwise require closer examination.

157. As noted previously, the EQB has decided to withdraw proposed amendments to two rule parts, Minn. R. 4410.4300, subp. 7 (Pipelines) and Minn. R. 4410.4400, subp. 8 (Metallic Mineral Mining and Processing). The Administrative Law Judge finds that the EQB's withdrawal of the originally proposed amendments to these two rule parts do not constitute a substantial change pursuant to Minn. Stat. § 14.05, subd. 2 from the rule as originally published.

158. As to any proposed rule that is not specifically addressed and analyzed in this Report, the Administrative Law Judge finds that the EQB has demonstrated by an affirmative presentation of facts the need for and reasonableness of all such rule provisions.

159. The Administrative Law Judge further finds that all proposed rule provisions not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

VI. Rules with Defects

160. The rules discussed in this section fail to meet the standards set forth at Minn. R. 1400.2100 or other applicable rulemaking standards. These rules, as proposed by the EQB, are not approved, for the reasons discussed below. However, all of the disapproved rules may be corrected and approved if the EQB adopts the Administrative Law Judge's recommended changes to the proposed rules, or language which is substantially similar to the recommended language.

A. Part 4410.4300, subp. 5: Fuel Conversion Facilities

161. The EQB proposes to amend Minn. R. 4410.4300, subp. 5, to state:

> A. ~~Items A and B~~ Subitems (1) and (2) designate the RGU for the type of project listed:
>
> ~~A.~~ (1) For construction of a new fuel conversion facility for the conversion of coal, peat, or biomass sources to gaseous, liquid, or solid fuels if that facility has the capacity to utilize 25,000 dry tons or more per year of input, the PCA ~~shall be~~ is the RGU.
>
> ~~B.~~ (2) For construction ~~or expansion~~ of a new fuel conversion facility for the production of alcohol fuels ~~which~~ that would have ~~or would increase~~

[186] Minn. R. 1400.2070, subp. 1 provides, in pertinent part: "If an agency is amending existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments."

~~its~~ the capacity ~~by~~ to produce 5,000,000 ~~or more~~ gallons or more per year of alcohol ~~produced~~, the PCA ~~shall be~~ is the RGU.

B. A mandatory EAW is not required for the projects described in Minnesota Statutes, section 116D.04, subdivision 2a, paragraph (b).[187]

162. The EQB asserted in its SONAR that it added Item B to align with Minn. Stat. § 116D.04, subd. 2a, para. (b), which reads:

> A mandatory environmental assessment worksheet shall not be required for the expansion of an ethanol plant, as defined in section 41A.09, subdivision 2a, paragraph (b), or the conversion of an ethanol plant to a biobutanol facility or the expansion of a biobutanol facility as defined in section 41A.15, subdivision 2d, based on the capacity of the expanded or converted facility to produce alcohol fuel, but must be required if the ethanol plant or biobutanol facility meets or exceeds thresholds of other categories of actions for which environmental assessment worksheets must be prepared. The responsible governmental unit for an ethanol plant or biobutanol facility project for which an environmental assessment worksheet is prepared shall be the state agency with the greatest responsibility for supervising or approving the project as a whole.[188]

163. Further, the EQB stated that the proposed addition of Minn. R. 4410.4300, subp. 5. B would offer "greater clarity, specificity and efficiency in determining if environmental review is required for a proposed project."[189]

164. One commenter raised concerns about whether the proposed language in Item B "could be interpreted that even if the project types meet another EAW threshold, they would be exempt from an EAW."[190] The commenter suggested deleting or rewriting Item B to clarify that project types "in and of themselves" are not mandatory EAW categories, but if project types exceed EAW thresholds, EAWs are required.[191]

165. In response to the commenter, the EQB reiterated its intention to align the environmental review rules with 2011 legislative requirements. The EQB stated that the referenced statute, Minn. Stat. § 116D.04, subd. 2a, paragraph (b), contains the full statutory language. Additionally, the EQB asserted, "Minnesota Rules, Chapter 4410.1000, subp. 2 of the environmental review rules already states that environmental review must be conducted for any project that meets or exceeds the thresholds of any of the EAW or EIS categories."[192]

166. Minn. Stat. § 116D.04, subd. 2a, paragraph (b) requires the EQB to "by rule establish categories of action for which . . . environmental assessment worksheets shall be

[187] Ex. C at 5.
[188] Ex. D at 73.
[189] *Id.*
[190] Exs. I.106, Q.1 at Comment 259.
[191] Exs. I.106, Q.1 at Comment 259.
[192] Ex. Q at 12.

prepared as well as categories of actions for which no environmental review is required under this section."

167. The Administrative Law Judge finds that the EQB's proposed changes to Minn. R. 4410.4300, subp. 5.A are needed and reasonable.

168. However, Minn. R. 1400.2100 D provides that a rule must be disapproved if the rule exceeds, conflicts with, or fails to comply with applicable law. The EQB's proposed language in Item B inaccurately states that fuel conversion projects do not require an EAW. Rather, Minn. Stat. § 116D.04, subd. 2a, para. (b) requires EAWs for projects that reach or surpass "thresholds of other categories of actions for which environmental assessment worksheets must be prepared." Minn. R. 4410.4300, subp. 5.B as proposed would contradict this statutory requirement, and cannot be approved.

169. The Administrative Law Judge recommends that the EQB amend Minn. R. 4410.4300, subp. 5. B as follows:

> B. An ~~mandatory~~ EAW is ~~not~~ required ~~for the projects described in Minnesota Statutes, section 116D.04, subdivision 2a, paragraph (b)~~ if an ethanol plant or biobutanol facility meets or exceeds thresholds of other categories of actions for which environmental assessment worksheets must be prepared.

170. The recommended change to the defect identified in proposed Minn. R. 4410.4300, subp. 5, Item B is needed and reasonable. The recommended change would cure the defect and would not result in a rule that is substantially different than the rule as originally proposed and noticed.

B. Minn. R. 4410.4300, subp. 6: Transmission Lines

171. Minn. R. 4410.4300, subp. 6, as proposed, states:

> Subp. 6. **Transmission lines.** ~~For construction of a transmission line at a new location with a nominal capacity of between 70 kilovolts and 100 kilovolts with 20 or more miles of its length in Minnesota, the EQB shall be the RGU~~. For construction of a high-voltage transmission ~~lines~~ line and associated facilities ~~designed for and capable of operating at a nominal voltage of 100 kilovolts or more~~, as defined in part 7850.1000, the PUC is the RGU. Environmental review ~~shall~~ must be conducted according to parts 7849.1000 to 7849.2100 and 7850.1000 to 7850.5600.[193]

172. One commenter at the May 31, 2019, public hearing stated that the proposed language in Minn. R. 4410.4300, subp. 6 lacks clarity because it appears to require a petition or PUC action to obtain an EAW for transmission lines with a nominal capacity between 70 and 100 kilovolts with 20 or more miles of its length in Minnesota.[194]

[193] Ex. C at 24.
[194] Tr. Vol. 1 at 47 (C. Overland).

173. In the SONAR, the EQB explains that it removed the first sentence in Minn. R. 4410.4300, subp. 6 "because those types of transmission lines [between 70 kilovolts and 100 kilovolts with 20 or more miles of its length] are not typically constructed in Minnesota." The EQB states, "[i]f a future need for these transmission lines were identified, the PUC could order a discretionary review or the public could submit a petition, if they believe the project may have the potential for significant environmental effects." The EQB designated the PUC as the RGU for the construction of high-voltage transmission line projects.[195]

174. The EQB acknowledges that high-voltage transmission line projects still require review. The EQB explains in the SONAR that the proposed changes "reasonably add a reference to, and existing definition of, 'high voltage transmission line' or 'HTVL'" to allow Minn. Rules, ch. 4410 to remain current with changes in other State regulatory requirements. Further, the EQB states that "using similar terminology with other applicable regulatory requirements helps the public with review, when environmental review documents and permits are co-noticed."[196]

175. In the EQB's July 16, 2019, response to comments, the EQB explains that local governments and citizens searching for information about environmental review of transmission lines are more likely to turn to Minnesota Rules 4410 for information than to Minn. Stat. ch. 16E, the Power Plant Siting Act, and the applicable rules. The EQB maintains the proposed changes to the rule will appropriately refer local governments and citizens to Minnesota Rules 7849 and 7850. The EQB insists that adding information in Minnesota Rule 4410 "regarding project types for which environmental review has been prescribed by the legislature . . . has not, to date, caused confusion for users of the rules. Rather, the inclusion has been helpful in directing local governments and citizens to the applicable environmental rules."[197]

176. The Administrative Law Judge finds the proposed amendment of Minn. R. 4410.4300, subp. 6, adding language at lines 5.18 through 5.21[198] is needed and reasonable. The cross-reference to rule parts that the PUC will apply to conduct its environmental review will assist local governments and citizens and streamline the environmental review process.

177. The Administrative Law Judge finds the EQB failed to demonstrate that the proposed amendment of Minn. R. 4410.4300, subp. 6, deleting language at lines 5.16 through 5.18,[199] is needed or reasonable. The EQB explained that it was deleting the language of the rule addressing construction of transmission lines with nominal capacity of between 70 and 100 kilovolts with 20 or more miles of its length in Minnesota because such transmission lines are "not typically constructed in Minnesota."[200] The EQB did not state that such lines are prohibited in Minnesota, or that they are never constructed in Minnesota. Nor did the EQB say that an EAW is no longer mandated for such lines. By affirmatively removing the language concerning these transmission lines, the EQB appears to be

[195] Ex. D at 74.
[196] *Id.*
[197] Ex. Q at 13.
[198] Ex. C.
[199] *Id.*
[200] Ex. D at 74.

removing them as actions requiring an EAW and, as the commenter stated, requiring a petition to be filed for an EAW to be conducted when a lower-kilovolt line is proposed. In the absence of a demonstration by the EQB of any need or justification for removing the reference to construction of a 70 to 100 kilovolt transmission line from the rule, the Administrative Law Judge disapproves this portion of the proposed amendment to Minn. R. 4410.4300, subp. 6, pursuant to Minn. R. 1400.2100.B.

178. The EQB can cure the defect to this proposed amendment by restoring the language it proposed to delete at lines 5.16 to 5.18[201] regarding construction of a transmission line at a new location with a nominal capacity of between 70 kilovolts and 100 kilovolts with 20 or more miles of its length in Minnesota.

179. Such a change would be needed and reasonable and would not constitute a substantial change pursuant to Minn. Stat. § 14.05, subd. 2.

C. Minn. R. 4410.4300, subp. 27: Wetlands and Public Waters

180. The EQB initially proposed the following changes to Minn. R. 4410.4300, subp. 27:

> ~~Wetlands and~~ Public waters, public water wetlands and wetlands. Items A and B designate the RGU for the type of project listed:
>
> A. For projects that will change or diminish the course, current, or cross-section of one acre or more of any public water or public waters wetlands except for those to be drained without a permit ~~pursuant~~ according to Minnesota Statutes, chapter 103G, DNR or local ~~government~~ governmental unit ~~shall be~~ is the RGU.
>
> B. For projects ~~that will change or diminish the course, current, or cross-section of 40 percent or more or five or more acres of types 3 through 8 wetland of 2.5 acres or more~~ cause an impact, as defined in part 8420.0111, to a total of one acre or more of wetlands, excluding public waters wetlands, if any part of the wetland is within a shoreland area, a delineated ~~flood plain~~ floodplain, a state or federally designated wild and scenic rivers district, the Minnesota River Project Riverbend area, or the Mississippi headwaters area, the local ~~government~~ governmental unit ~~shall be~~ is the RGU.

181. The EQB received multiple comments, primarily from municipalities and county governments, on the EQB's proposed changes to Minn. R. 4410.4300, subp. 27 during the dual-notice comment period.[202]

182. Many of the counties expressed concerns that the proposed rule expands the types of wetlands within the scope of the rule to include the very common types of

[201] Ex. C.

[202] Exs. I.1, I.5, I.10, I.21, I.22, I.23, I.26, I.28, I.29, I.30, I.31, I.32, I.33, I.34, I.35, I.40, I.50, I.51, I.52, I.53, I.54, I.62, I.77, I.82, I.83, I.84, I.85, I.87, I.88, I.90, I.93, I.94, I.95, I.96, I.97, I.98, I.99a, I.99dd, I.100, I.103, I.106, I.107, I.109, I.123, I.126, I.144, I.145, I.151, I.153, I.154, I.155, I.156, I.157, I.158, and I.159.

wetlands – types 1 and 2. In addition, the counties expressed alarm that the area for triggering the EAW requirement is reduced to one acre, made up by accumulating smaller wetland impacts. While acknowledging that the rule only applies to certain kinds of wetlands, the comments note that shoreland area is one kind of wetland area that is included and that many county highway projects "replace road crossings over streams and necessitate at least some impacts within the shoreland zone."[203] The counties asserted that this would lead to overuse of the EAW, which would undercut its effectiveness as a useful planning tool.[204]

183. The municipal and county commenters claimed that the proposed revision to Minn. R. 4410.4300, subp. 27, item B does not streamline the EAW process. Therefore, it is inconsistent with the intent of the rulemaking.[205] Furthermore, according to the Minnesota County Engineers Association, the proposed revisions to item B would cost Minnesota counties statewide "at least an additional $2,000,000 per year for routine road safety improvement projects that qualify for the Local Road Wetland Replacement Program."[206] The counties cautioned that this estimate is conservative "because it does not include non-road projects such as . . . sidewalks or new maintenance facilities . . . ."[207] They also expressed concerns about the impact the proposed rule change would have on project delivery timelines, estimating that the additional EAW requirements could delay projects by up to a year, with attendant increases in construction, safety, social, and economic costs. According to the counties, a typical $800,000 bridge replacement project delayed for one year adds approximately $25,000 to $40,000 to the project cost.[208]

184. The counties pointed out that the EAW requirement established by Minn. R. 4410.4300, subp. 27.B is duplicative of existing state and federal requirements governing work in wetlands and public waters requiring the proposer to avoid, minimize, and mitigate impacts on the wetlands. Department of Natural Resources (DNR) and United States Army Corps of Engineers (USACE) permits are required for these projects, as are Minnesota Pollution Control Agency (MPCA) 401 certifications related to erosion control and water quality. Nonetheless, the counties said, frequently there is no reasonable alternative to building the project to meet safety standards.[209]

185. Representative (Rep.) Dale Lueck cautioned that, should the EQB proceed with its proposed more restrictive acreage and wetland type parameters, it would be "acting beyond the scope of its authority. . . ."[210] Rep. Lueck stated that the legislature has not directed the EQB to change specific wetland acreage parameters, and "[t]o do so without specific legislative direction disregards the spirit and intent of EQB's existing rule making

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[203] *See, e.g.*, Ex. I.23 at 70 (Comment by Karin Grandia, P.E., Itasca County Engineer) (Dec. 18, 2018). The cited Comment is identical, or nearly identical, to the letters cited in the preceding footnote from most of the counties. The page cite is to the continuous page numbers at the bottom center assigned to the public comments by the EQB, not to the page number of the comment as originally provided.
[204] *Id.*
[205] *Id.* at 71. *See, e.g.,* Ex. I.90 at 298 (Comment by Steven G. Bot, City Administrator, City of St. Michael) (Jan. 4, 2019). This comment is typical of comments submitted by a number of cities. While much briefer than the letters from the counties, the sentiments expressed in the cities' comments are essentially the same.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 72.
[209] *Id.* at 72-73.
[210] Ex. I.10 at 33.

authority."[211] Rep. Lueck maintained that this proposed change lacks sufficient justification and analysis of mandated costs it will impose on LGUs and private citizens. In addition to echoing the concerns of the counties and cities regarding increased costs to those entities, Rep. Lueck raised concerns about an unfair cost burden being placed on private citizens living in areas that retain most of their pre-settlement wetlands.[212] In addition, Rep. Lueck asserted that there was insufficient opportunity for public input on the rule.[213]

186. Two commenters were opposed to the proposed language change to item B which would eliminate the reference to wetland types 3 through 8 and insert a reference to part 8420.0111 "because part 8420.0111 only provides protections for wetland types 3 through 5 so this language change would remove protections for wetland types 6 through 8."[214]

187. A commenter predicted that replacing the "change or diminish the course, current, or cross section" language in item B with the phrase "cause an impact" will increase costs to projects due to additional staff time and resources needed for initial data gathering to determine and quantify impacts, if any.[215]

188. The EQB maintained that the proposed rule language would not allow a project to occur within wetland types 6 through 8 without an EAW, and that use of the term "impact should not change the current scope of assessing the requirements of environmental review." The EQB emphasized that "impact" is applicable to local units of government administering the WCA, and that "draining or filling of all types of wetlands (types 1-8) would be defined as an impact per Minn. R. ch. 8420."[216]

189. The EQB stated that the change of language from "change or diminish the course, current, or cross section" to "cause an impact" should not change the practice in application of the rule. According to the EQB, "impact" is more specific and will narrow the overall scope of the rule, because there are a number of exemptions that may apply under the Wetland Conservation Act, pursuant to Minn. R. 8420.0420.

190. In response to the concerns raised by governmental entities and others regarding the proposed amendment defining new wetland acreage parameters, the EQB stated that the goal of the proposed revisions "is to change a confusing formula and replace it with updated language that aligns with the Wetland Conservation Act."[217]

191. The EQB asserted that the proposed acreage change both creates greater efficiency and that it is consistent with the EQB's "general authority to periodically update categories."[218] The EQB cited specifically as its statutory authority Minn. Stat. § 116D.04, subd. 2(a)(b), which directs it to establish, by rule, mandatory categories for EAWs, EISs, and exemptions from environmental review; and 2015 Minn. Laws 1st Spec. Sess. Ch. 4,

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[211] *Id.*
[212] *Id.* at 34.
[213] *Id.* at 33.
[214] Ex. I.99a (Comment of L. Gregg) (Jan. 9, 2019). *See* Tr. Vol. 1 at 65-67 (L. Gregg and C. Lange).
[215] Ex. I.99dd (Comment of M. Stalberger, Blue Earth County) (Feb. 4, 2019).
[216] Ex. Q at 57.
[217] *Id.* at 36.
[218] *Id.*

art. 3, §2, which appropriated funds for the EQB "to streamline the environmental review process."

192. Citing Minn. R. 8420.0105, the EQB stated that the Wetland Conservation Act "regulates all wetlands regardless of type. . . ."[219]

193. The EQB maintained that its revisions are not imposing acreage that is more restrictive than the rule was before, but simply applying the lowest threshold that was already in the rule. The EQB likewise denied targeting any geographical area. Its intent is to streamline the process by simplifying wording that is very difficult to interpret. According to the EQB, the:

> Wetland Conservation Act does not distinguish between wetland functions and values based on type or size. The proposed language is an attempt to simplify the category so that when a proposed project that is in an overlay district, impacts a wetland (no matter the type), a simple calculation in acreage is all that is required to determine if a proposed project meets a mandatory threshold.[220]

194. In response to the argument that mandated EAWs would duplicate federal environmental review required by the USACE, the EQB asserted that there is not federal review for all of the impacts subject to USACE jurisdiction. Therefore, according to the EQB, it is incorrect to assume that the level of environmental review provided by the state is equaled by the federal environmental review.[221]

195. The EQB cited a Request for Comments from July 22, 2013, that stated that Minn. R. ch. 4410 could be affected by proposed rulemaking. This information was repeated in a November 9, 2015, Request for Comments. A third Request for Comments, published on October 24, 2016, included a list "which included all subparts within 4410.4300" and a statement that the rulemaking could include revisions that arise as a result of public comment and further review of the chapter.[222] Informational meetings and open houses regarding the proposed rules were held on March 18, 21, and 22, 2016, and June 28, 2016. Preliminary language, including the proposed language at issue in Minn. R. 4410.4300, subp. 27, was presented to the EQB at meetings open to the public on August 15, 2018, and September 19, 2018.[223]

196. At the May 31, 2019, hearing, the EQB stated it intends to amend the proposed language at Minn. R. 4410.4300, subp. 27.B, by adding an exemption to the EAW requirement, as follows:

> B. For projects ~~that will change or diminish the course, current, or cross-section of 40 percent or more or five or more acres of types 3 through 8 wetland of 2.5 acres or more~~ <u>cause an impact, as defined in part 8420.0111, to a total of one acre or more of wetlands</u>, excluding public waters wetlands,

[219] *Id.* at 52.
[220] *Id.* at 47.
[221] Ex. Q at 44.
[222] *Id.* at 44.
[223] *Id.* at 44-45.

if any part of the wetland is within a shoreland area, a delineated ~~flood plain~~ floodplain, a state or federally designated wild and scenic rivers district, the Minnesota River Project Riverbend area, or the Mississippi headwaters area, the local ~~government~~ governmental unit ~~shall be~~ is the RGU. Item B does not apply to projects exempted by part 4410.4600, subpart 14.[224]

197. The response from the public entities to this change was positive.[225] There were no further comments received during the post-hearing comments period regarding Minn. R. 4410.4300, subp.27.B.

198. The Administrative Law Judge approves the portion of the EQB's proposed amendment to Minn. R. 4410.4300, subp. 27.B, replacing the formula for calculating the applicable area with the language "cause an impact . . . to a total of one or more acres of wetlands" because it is needed and reasonable. The proposed language streamlines and simplifies the rule, and will enable proposers and RGUs to apply the rule more easily and consistently. The EQB's choice of one acre as the minimum required acreage to trigger application of the rule is reasonable, because it is not a significant departure from the current rule, which uses one acre as the smallest area that can bring a project within the scope of the rule. To the extent that this will apply to some projects to which it would not have otherwise applied, the EQB is authorized to decide, as a matter of policy, that the category of projects to which the rule applies should be expanded, pursuant to Minn. Stat. § 116D.04, subd. 2a(b).

199. The Administrative Law Judge concludes that the EQB's proposed amendment to its initial proposed changes to Minn. R. 4410.4300, subp. 27.B is needed and reasonable. The amendment is not a substantial change from the rule as originally published in the State Register pursuant to Minn. Stat. § 14.05, subd. 2.

200. The Administrative Law Judge disapproves a portion of Minn. R. 4410.4300, subp. 27.B as proposed because it fails to define the parameters of the types of wetlands included within the scope of the proposed rule. The EQB proposed to delete the language referring to types 3 through 8 wetlands in its formula for calculating the amount and type of wetlands to which the rule applies. In replacing the formula, the EQB does not propose any new language referring to types of wetlands included in the scope of the rule. The EQB's argument that the WCA applies to all wetlands, regardless of type, and so all types are included within the scope of this rule, is not apparent from the language of the rule. The initial confusion arises from the deletion of the reference to types 3 through 8 wetlands. The confusion it compounded by the reference to the definition to the definition of "impact" at Minn. R. 8420.0111 (2017), which states:

[224] Ex. L.1; Tr. Vol. 1 at 41-42 (E. Cedarleaf Dahl). Minn. R. 4410.4600, subp. 14 exempts various highway projects, such as safety improvement projects, installation of traffic control devices, noise barriers, bus shelters, bus and transit and paratransit van egress lanes, certain road and bridge resurfacing, restoration, or rehabilitation, roadway landscaping, construction of bicycle and pedestrian paths within an existing right-of-way, stream diversion, realignment, or channelization within an existing right-of-way associated with bridge or culvert replacement, or reconstruction or modification of an existing bridge structure on essentially the same alignment or location involving acquiring minimal right-of-way.

[225] Tr. Vol. 1 at 79-81 (C. Andrews) and 83 (D. Sauve).

> "Impact" means a loss in the quantity, quality, or biological diversity of a wetland caused by draining or filling of wetlands, wholly or partially, or by excavation in the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands, as defined in subpart 75, and in all wetland types if the excavation results in filing, draining, or conversion to nonwetland.

201. Based on this language, it appears that there may be instances when Minn. R. 4410.4300, subp. 27.B would not apply to projects involving wetland types 6 through 8. That appears to be inconsistent with the intent of the EQB. The Administrative Law Judge finds that language of the rule as proposed is, in this regard, not rationally related to the EQB's objective and therefore must be disapproved.

202. The EQB can cure the defect to this proposed amendment by inserting clarifying language into the proposed Minn. R. 4410.4300, subp. 27. B. as follows:

> B. For projects that will cause an impact, as defined in part 8420.0111, to a total of one acre or more of <u>type 3 to 8</u> wetlands, excluding public waters wetlands, if any part of the wetland is within a shoreland area . . .

Or

> B. For projects that will cause an impact, as defined in part 8420.0111, to a total of one acre or more of wetlands, <u>regardless of type,</u> excluding public waters wetlands, if any part of the wetland is within a shoreland area . . .

203. Either of the suggested changes would cure the defect, be needed and reasonable, and would not constitute a substantial change pursuant to Minn. Stat. § 14.05, subd. 2.

VII. Responses to Other Proposed Controversial Rules

204. Stakeholders commented on other language in the proposed rule, and the EQB responded to all of the comments it received. The Administrative Law Judge notes specifically several of the more controversial provisions which were commented upon, but for which no changes are proposed or recommended.

A. Minn. R. 4410.0500, subp. 6: Exception (RGU Selection Procedures)

205. The EQB proposes to amend Minn. R. 4410.0500, subp. 6 as follows:

> Notwithstanding subparts 1 to 5, the EQB or <u>EQB chair</u> may designate, ~~within five days of receipt of the completed data portions of the EAW,~~ a different RGU for the project if ~~the EQB determines~~ the designee has greater expertise in analyzing the potential impacts of the project.

206. According to the SONAR, the purpose of the proposed amendments is to allow the EQB chair to re-designate an RGU in order to process requests more efficiently.[226] The EQB states that the change in RGU selection procedures "will allow

[226] Ex. D at 70.

flexibility for making non-controversial decisions and does not prevent anyone from making a request for the full Board to consider the decision."[227] The EQB will publish requests a week in advance of approval, which will allow board members to request the Board's full review.[228]

207. Multiple commenters expressed concern with the EQB's proposed change to permit the EQB Chair to re-designate the RGU.[229] Several commenters stated that full Board review of RGU re-designations promotes greater transparency and government accountability.[230] Specifically, many commenters noted, "It is important for the full Board to retain this decision-making authority for the sake of accountability, so the public can watch and comment."[231] Some commenters also opposed the removal of the five-day timeframe for the designation.[232]

208. The EQB responded to commenters, asserting that the change allowing the EQB chair to re-designate an RGU "ensures that the request will be processed more timely" and that the full board will review RGU designations if requested.[233]

209. The EQB also addressed the concerns about the removal of the five-day timeline. In the SONAR, the EQB stated that the Board removed the timeframe to allow for more collaboration. As the EQB notes, "project proposers often work with the RGU to determine what type of information is needed. Removing the requirement to have a complete data submittal before the RGU designation process is complete will ensure that parties are identified early in the process and work together in the EAW development process."[234] In both the SONAR and the EQB's response to comments, the EQB notes that the five-day time limit was inconsistent with the Board's meeting schedule. According to the EQB, removal of the five-day time limit will result in more flexibility while permitting full Board review upon request.[235]

210. The Administrative Law Judge finds that the EQB's proposed changes to 4410.0500, subp. 6 are needed and reasonable and meet the Legislature's mandate to streamline the environmental review process. Many other current EQB rules allow the EQB chair to make determinations on other EQB issues.[236] The Administrative Law Judge finds that it is reasonable for the EQB to put the same procedure into place for RGU designation.

B. Minn. R. 4410.4300, supb. 3: Electric-Generating Facilities

211. The EQB proposed to add clarifying language to the rule designating the RGU for electric-generating facilities of various types and capacities. The EQB proposed new

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[227] *Id.*
[228] *Id.*
[229] Exs. I.9, I.13, I.36, I.61, I.67, I.70, I.73, I.81, I.102, I.104, I.106, I.108, and I.142, and Tr. Vol. 1 at 48-49 (R. Chamblin); Tr. Vol. 1 at 109-110 (S. Erickson); and Tr. Vol. 1 at 116-117 (B. Pastarr).
[230] Exs. I.9, I.61, I.67, I.70, I.81, I.104, I.108, and I.142.
[231] Exs. I.45, I.46, I.47, I.56, I.57, I.67, I.68, and I.69.
[232] Tr. Vol. 1 at 48-49 (R. Chamblin); Tr. Vol. 1 at 116-117 (B. Pastarr).
[233] Ex. Q at 6-7.
[234] Ex. D at 70.
[235] *Id.*; Ex. Q at 7.
[236] *See, e.g.,* Minn. R. 4410.0500, subp. 3; .1100, subps. 5, 7; .1300; .1700, subp. 2; .3100, subp. 9; .3610; .7906, subp. 3; .7930; .7932, subp. 5 (2017).

language separately addressing large wind energy conversion systems.[237] Minn. R. 4410.4300, subp. 3.D, as proposed, would state:

> For construction of a wind energy conversion system, as defined in Minnesota Statutes, section 216F.01, designed for and capable of operating at a capacity of 25 megawatts or more, the PUC is the RGU, and an environmental review must be conducted according to chapter 7854.

212. One commenter asserted that the proposed language to Minn. R. 4410.4300, subp. 3.D lacked clarity, noting that Minn. R. ch. 7854 states that the PUC permit replaces an EAW but that an EAW appears necessary under the EQB rules.[238]

213. In the EQB's July 16, 2019, response, the EQB explains that it included the reference to Minn. R. ch. 7854 in the proposed changes "solely for informational purposes," because local governments and citizens researching environmental review of wind turbines are more likely to turn to the EQB rules. This change directs the reader to the proper rule part, like other informational references in Minnesota Rules.[239]

214. Another commenter stated that wind projects do not require environmental review.[240]

215. The EQB responded to the commenter, stating that Minn. R. ch. 7854 governs environmental review for wind projects. The EQB provided further background about rulemaking for wind projects, asserting that "[t]he sufficiency of the environmental review required by Chapter 7854 and whether Chapter 7854 should be revised or amended is beyond the scope of this rulemaking."[241]

216. A determination regarding the adequacy of Minn. R. ch. 7854 as an environmental review tool for large wind energy conversion projects is not within the scope of this proceeding. The Administrative Law Judge concludes that the EQB's proposed changes to 4410.4300, subp. 3 are needed and reasonable. These changes are consistent with informational cross references in other rule parts.

C. Minn. R. 4410.4300, subp. 10: Storage Facilities

217. The EQB proposed the following changes to Minn. R. 4410.4300, subp. 10:

> Subp. 10. **Storage facilities.** Items A to ~~C~~ H designate the RGU for the type of project listed:
>
> A. For construction of a new facility designed for or capable of storing more than 7,500 tons of coal or with an annual throughput of more than

[237] *See* Minn. Stat. § 216F.01, subd. 2 (2018).
[238] Exs I.106, Q.1 at Comment 258.
[239] Ex. Q at 8-9.
[240] Tr. Vol. 1 at 46 (C. Overland).
[241] Ex. Q at 9.

125,000 tons of coal~~;~~ or the expansion of an existing facility by these respective amounts, the PCA ~~shall be~~ is the RGU.

B. For construction of a new major facility ~~on a single site designed for or capable of storing 1,000,000 gallons or more of hazardous materials~~, as defined in part 7151.1200, that results in a designed storage capacity of 1,000,000 gallons or more of hazardous materials, the PCA ~~shall be~~ is the RGU.

C. For expansion of an existing major facility, as defined in part 7151.1200, with a designed storage capacity of 1,000,000 gallons or more of hazardous materials when the expansion adds a net increase of 1,000,000 gallons or more of hazardous materials, the PCA is the RGU.

D. For expansion of an existing facility that has less than 1,000,000 gallons in total designed storage capacity of hazardous materials when the net increase in designed storage capacity results in 1,000,000 gallons or more of hazardous materials, the PCA is the RGU.

~~C.~~ E. For construction of a new facility designed for or capable of storing on a single site 100,000 gallons or more of liquified natural gas, as defined in Minnesota Statutes, section 299F.56, subdivision 14, or synthetic gas, ~~or anhydrous ammonia~~ as defined in Minnesota Statutes, section 216B.02, subdivision 6b, the ~~PCA shall be~~ PUC is the RGU, except as provided in item G.

F. For construction of a new facility designed for or capable of storing on a single site 100,000 gallons or more of anhydrous ammonia, the MDA is the RGU, except as provided in item G.

G. For construction of a new facility designed for or capable of storing on a single site 100,000 gallons or more of a combination of liquefied natural gas, as defined in Minnesota Statutes, section 299F.56, subdivision 14; synthetic gas, as defined in Minnesota Statutes, section 216B.02, subdivision 6b; or anhydrous ammonia, the PUC is the RGU.

H. The PCA is the RGU for a silica sand project that:

(1) is designed to store or is capable of storing more than 7,500 tons of silica sand; or

(2) has an annual throughput of more than 200,000 tons of silica sand.[242]

218. Two commenters expressed concern with the removal of the phrase "designed for or capable of storing" before the quantity of 1,000,000 gallons in the EQB's proposed changes to Items C and D.[243] One of the commenters emphasized, "[o]therwise,

[242] Ex. C at 27-28.
[243] Tr. Vol. 1 at 49-50 (R. Chamblin); Tr. Vol. 1 at 99-100 (K. Hollander).

a new facility with a slated design of less than 1,000,000 but capable of storing more could bypass an EAW altogether."[244] The other commenter held similar concerns, noting that "unless somebody is tracking very carefully that storage facility of hazardous materials could easily fall out of the category of the EAW."[245]

219. The SONAR does not directly explain the EQB's use of the phrase "designed storage capacity."[246] In the EQB's July 16, 2019, response to comments, the EQB explains that proposed items B, C, and D relate to above ground storage tanks (AST), which the MPCA regulates. The EQB asserts that it included the phrase "design storage capacity" to match the language in the MPCA's AST permit program.[247] Items B and C add the term "major facility." Minn. R. 7451.1200, subp. 22 (2017) defines "major facility:"

> "Major facility" means an assemblage of one or more aboveground storage tanks, including any indoor tanks, together with any associated secondary containment areas, appurtenances, and substance transfer areas, that are located at a single property or multiple contiguous properties and where the total substance design storage capacity of all such tanks at the site is 1,000,000 gallons or greater.

The EQB notes that "or capable of storing" is not found in this definition; therefore, the EQB asserts that it changed the term to "design storage capacity" in items B and C, and also D, to align with AST permits.[248] Item D does not contain the phrase "major facility."

220. The EQB further explains that the use of "designed storage capacity" references an existing definition to provide "greater clarity and consistency in determining if environmental review is required for a proposed project and ensures that Minn. Rules Ch. 4410 will stay current when other applicable State regulatory requirements are updated." Further, the EQB states, "Using the same terms also helps the public with review when environmental review documents and draft permits are co-noticed."[249]

221. The Administrative Law Judge finds that it is reasonable for the EQB to adjust the terminology applicable to ASTs to be consistent with governing regulatory language that will be used in documents that may be viewed in conjunction with an EAW. Using the term "designed storage capacity" in this context will help to minimize confusion by regulators, project proposers, and the public. Therefore, the rules the EQB's proposed changes to Minn. R. 4410.4300, subp. 10 are needed and reasonable.

[244] Tr. Vol. 1 at 50 (R. Chamblin).
[245] Tr. Vol. 1 at 99 (K. Hollander).
[246] *See* Ex. D at 80-81.
[247] Ex. Q at 19-20.
[248] *Id.* at 20.
[249] *Id.*

D. Minn. R. 4410.4300, subp. 22: Highway Projects

222. The EQB proposed to clarify the phrase "travel lanes" by replacing this language with "through lanes or passing lanes" and excluding "auxiliary lanes." The EQB also increased the construction threshold length from 1 mile to 2 miles.[250]

223. One commenter opposed these changes, noting that it seemed like "a step backwards in Environmental Review" and arguing for a reduction in the mandatory threshold project mileage.[251]

224. The EQB responded to the comment, explaining the rationale for exclusion of auxiliary lanes:

> Auxiliary lanes serve specific purposes over short distances and their primary purpose is not to expand capacity but to improve traffic flow. In addition, EQB determined that 'passing lanes' should be specifically excluded from auxiliary lanes because, although passing lanes are also auxiliary lanes of short distances, there are some projects in which passing lanes can extend for many miles, thus increasing the potential for impact.[252]

225. Further, the EQB explained that the EQB proposed the change to the mandatory threshold based on MnDOT project data over the course of the past 10 years. This data indicated that EAWs for this highway project category (with a threshold distance of 1 to 2 miles) did not have the potential for significant environmental effects and were not deemed controversial.[253]

226. The Administrative Law Judge concludes the EQB's proposed changes to Minn. R. 4410.4300, subp. 22 are needed and reasonable.

E. Minn. R. 4410.4300, subp. 37: Recreational Trails

227. The EQB proposed the following changes to Minn. R. 4410.4300, subp. 37, items A and B:

> A. Constructing a trail at least ~~ten~~ 25 miles long on forested or other naturally vegetated land for a recreational use ~~other than snowmobiling or cross-country skiing~~, unless exempted by part 4410.4600, subpart 14, item D~~, or constructing a trail at least 20 miles long on forested or other naturally vegetated land exclusively for snowmobiling or cross country skiing~~.
>
> B. Designating at least 25 miles of an existing trail for a new motorized recreational use other than snowmobiling. When designating an existing motorized trail or existing corridor in current legal use by motor vehicles, the designation does not contribute to the 25-mile threshold under this item. When adding a new recreational use or seasonal recreational use to an

[250] Exs. C at 14, D at 87-89.
[251] Post-hearing eComment by M. Tauber (July 12, 2019); Ex. Q.1 at Comment 442.
[252] Ex. Q at 22.
[253] *Id.*

existing motorized recreational trail, the addition does not contribute to the 25-mile threshold if the treadway width is not expanded as a result of the added use.

In applying items A and B, if a proposed trail will contain segments of newly constructed trail and segments that will follow an existing trail but be designated for a new motorized use, an EAW must be prepared if the ~~sum~~ total length of the ~~quotients obtained by dividing the length of the new construction by ten miles and the length of the existing but~~ newly constructed and newly designated ~~trail by 25 miles, equals or exceeds one~~ segments is at least 25 miles.[254]

228. The EQB received several comments stating that every proposed route or trail should undergo mandatory environmental review.[255] Commenters also raised concerns with the change in threshold to 25 miles.[256]

229. In the SONAR, the EQB explains that the changes to items A and B are "necessary to fulfill a directive by the Legislature to update environmental review rules to allow certain trails to be built or designated without requiring environmental review."[257] The relevant statutory language states:

(a) The Environmental Quality Board shall amend Minnesota Rules, chapter 4410, to allow the following without preparing a mandatory environmental assessment worksheet:

(1) constructing a Recreational trail[] less than 25 miles long on forested or other naturally vegetated land for a recreational use;

(2) adding a new motorized recreational use or a seasonal motorized recreational use to an existing motorized Recreational trail[] if the treadway width is not expanded as a result of the added use; and

(3) designating an existing, legally constructed route, such as a logging road, for motorized Recreational trails use.

(b) The board may use the good cause exemption rulemaking procedure under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules under this section, and Minnesota Statutes, section 14.386, does not apply except as provided under Minnesota Statutes, section 14.388.[258]

230. The EQB explains that it attempted to adopt rules pursuant to 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33 using the "good cause" exemption in November 2015. These proposed rules were not approved. The EQB re-submitted

[254] Ex. C at 18.
[255] Exs. I.101, I.105, I.110, I.111, I.112, I.113, I.114, I.115, I.117, I.118, I.119, I.120, I.122, I.124, I.128, I.129, I.131, I.132, I.133, I.134, I.135, I.137, I.138, I.139, I.140, I.141, I.143, I.146, I.148, and I.149.
[256] Tr. Vol. 1 at 61-62 (J. Haberman); Tr. Vol. 1 at 76-77 (D. Wilm).
[257] Ex. D at 95.
[258] 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 5, § 33.

proposed rules for adoption in February 2016, but these rules were again disapproved. An Administrative Law Judge found the EQB's proposed rule did not meet the standard under Minn. Stat. § 14.388, subd. 3 (2018), which requires that, to promulgate a rule using the "good cause exempt" process, an agency must "incorporate specific changes set forth in applicable statutes when no interpretation of law is required." Because incorporation of the changes required by 2015 Minn. Laws 1st Spec. Sess., ch. 4, art. 5, § 33 into the language of Minn. R. 4410.4300, subd. 37.B necessitated some interpretation of existing statutes, the Administrative Law Judge held that the EQB could not proceed with the good cause exempt process.[259] The EQB encountered the same problem on its second attempt to use the good cause exempt process.[260]

231. The EQB asserts in its SONAR that the proposed changes to items A and B "will fulfill the intent of the 2015 legislation by utilizing commonly understood language for trails and motorized corridors while maintaining the integrity of the intent of the legislation – to allow trails to be constructed or designated without requiring an EAW or environmental review."[261] The EQB points out that its proposed changes fall under the mandatory category section as "exclusions" versus "exemptions," such that "citizens and stakeholders can still petition if a project presents the potential for significant environmental effects."[262] Further, "[t]he threshold changes to A. and B. are necessary and reasonable because the 2015 Legislature determined there was potential for significant environmental effects at the proposed threshold levels."[263]

232. In its July 16, 2019, response to comments, the EQB reiterates that the proposed changes to items A and B are needed to fulfill the Legislature's mandate to revise environmental review rules to allow for the construction or designation of certain trails without environmental review.[264]

233. One commenter addressed the formula, stating that the EQB should strike "newly designated" from line 18.5 of its proposed rules. The commenter maintained that this language "seems to imply that newly designated trails would also count towards the 25 mile threshold for a mandatory EAW, while under part B, (line 17.20-17.25), the new rule specifically states that it doesn't count towards the 25 miles."[265]

234. In response, the EQB stated that the formula for newly designated and newly constructed trails does not work if "newly designated" is not included." The EQB clarifies that a "designation does not count toward the mileage total if it meets any of the specific criteria laid out in item B."[266]

235. The EQB also stated, in response to comments that "an established corridor in current legal use" is too broad and ambiguous a term, that this term has been defined in subpart 37 since 2004 and is not proposed for changes in the current rulemaking. Based

[259] Ex. D.3.a.
[260] Ex. D.3.b.
[261] Ex. D at 96.
[262] *Id.*
[263] *Id.*
[264] Ex. Q at 67.
[265] Exs. I.11, Q.1 at Comment 46.
[266] Ex. Q at 67.

on the language of the 2004 SONAR, which explained that the term refers to "legitimate trails now in existence" as opposed to "unplanned or unauthorized tracks or pathways through forests or other lands which, although they may physically resemble legitimate trails, should not be recognized as acceptable routes for future recreational travel . . . ."[267] The EQB further clarified that, based on this proposed language, "[a] public road is a possible example of an existing corridor that would be eligible for this type of exclusion."[268]

236. The Administrative Law Judge concludes the EQB's proposed changes to Minn. R. 4410.4300, subp. 37 are needed and reasonable in light of the Legislature's 2015 directive. The EQB complied with the Legislative's requirements in its proposed changes.

VIII. Additional Concerns Raised

237. Many individuals expressed significant concerns about climate change, and about the significance the EQB's decisions can have on climate change issues. One commenter discussed the important role that an EIS can play in public decision-making regarding environmental protection.[269] The commenter spoke of the importance of the EIS in a recent decision to close a coal power plant,[270] and her hope that the EQB will expand the use of EISs rather than EAWs.[271] Another commenter discussed the importance of moving to renewable energy and how using an EIS could support that transition.[272]

238. There were a number of comments concerning tribal treaty rights and the impact of state environmental decision-making on the ability of the Indian tribes to exercise their rights.[273] One commenter stated that the EQB failed to address the impact of the proposed rules on the 1825 or 1854 Treaties.[274] The same commenter expressed concerns about the air and water quality at Fond du Lac.[275]

239. Another commenter stated her concerns about the Husky Refinery explosion, and the effect of hydrogen fluoride on the waters of Lake Superior.[276]

240. Other commenters stated that treaties are a government-to-government relationship and that their people are the people of the water, and they have not surrendered their right to protect their water. They emphasized that the EQB has a responsibility to be more inclusive of the people who are going to be most impacted by the

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[267] *Id.* at 68.
[268] *Id.*
[269] Tr. Vol. 2 at 160-164 (R. Thelen).
[270] *Id.* at 162.
[271] *Id.*
[272] Tr. Vol. 2 at 167-169 (M. Burrell); Tr. Vol. 1 at 98-99 (K. Hollander); Tr. Vol. 1 at 103-106 (A. Pearson); Tr. Vol. 1 at 113-114 (W. Mattison); Tr. Vol. 1 at 115 (B. Pastarr). *See also* Post-hearing comments submitted by W. Mattison (July 16, 2019).
[273] Tr. Vol. 2 at 167-169 (M. Burrell); Tr. Vol. 1 at 71-72 (J. Peterson).
[274] Tr. Vol. 1 at 51 (S. Chamblin).
[275] *Id.* at 52-53.
[276] Tr. Vol. 1 at 53-54 (D. Topping).

EQB's decisions. They stated that the EQB should speak to the people of the tribes, not to their elected representatives.[277]

241. The EQB expressed an interest in engaging in discussions with tribal representatives in the future, to hear the thoughts of the representatives, and to consider them in future actions.[278]

242. The Administrative Law Judge acknowledges the comments that were made regarding the urgent need to address issues affecting climate change, as well as air and water quality, and the important need for the members of Minnesota's Indian tribes to be recognized and included in discussions about these issues.

243. Findings regarding these issues fall outside the scope of this limited rulemaking. Nonetheless, the Administrative Law Judge encourages the EQB to take careful note of the volume and seriousness of the response to this rulemaking as it continues its important work.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board gave notice to interested persons in this matter and fulfilled its additional notice requirements.

2. The Board fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule, except as noted in this report.

3. Any procedural errors made by the Board were harmless within the meaning of Minn. Stat. § 14.15, subd. 5.

4. The Board demonstrated it has statutory authority to adopt the proposed rules, and it fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i), (ii).

5. The Notice of Hearing, the proposed rules, and the SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).

6. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50, with the exception of Minn. R. 4410.4300, subp. 5, Item B, .4300, subp. 6, and 4300, subp. 27, Item B, as discussed in Section VI of this Report.

7. The modifications to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not substantially different from

[277] Tr. Vol. 1 at 56-60 (N. Beaulieu); Tr. Vol. 1 at 110 (S. Erickson).
[278] Tr. Vol. 1 at 53 (D. Wilson).

the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. During the public comment process, a number of stakeholders urged the Board to adopt other revisions to the proposed rules. In each instance where the Board declined, the Board's rationale in declining to make the requested revisions to its rules was well-grounded in the record and reasonable.

9. A Finding or Conclusion that a proposed rule is needed and reasonable does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rules finally adopted are based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

The proposed amended rules should be adopted, except as otherwise noted at Findings 168, 169, 177, 178, 200, 201, and 202, and with any further modifications the Board may choose consistent with this Report.

Dated: August 22, 2019

LAURASUE SCHLATTER
Administrative Law Judge

NOTICE

Rule Report with Defects after Hearing

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.